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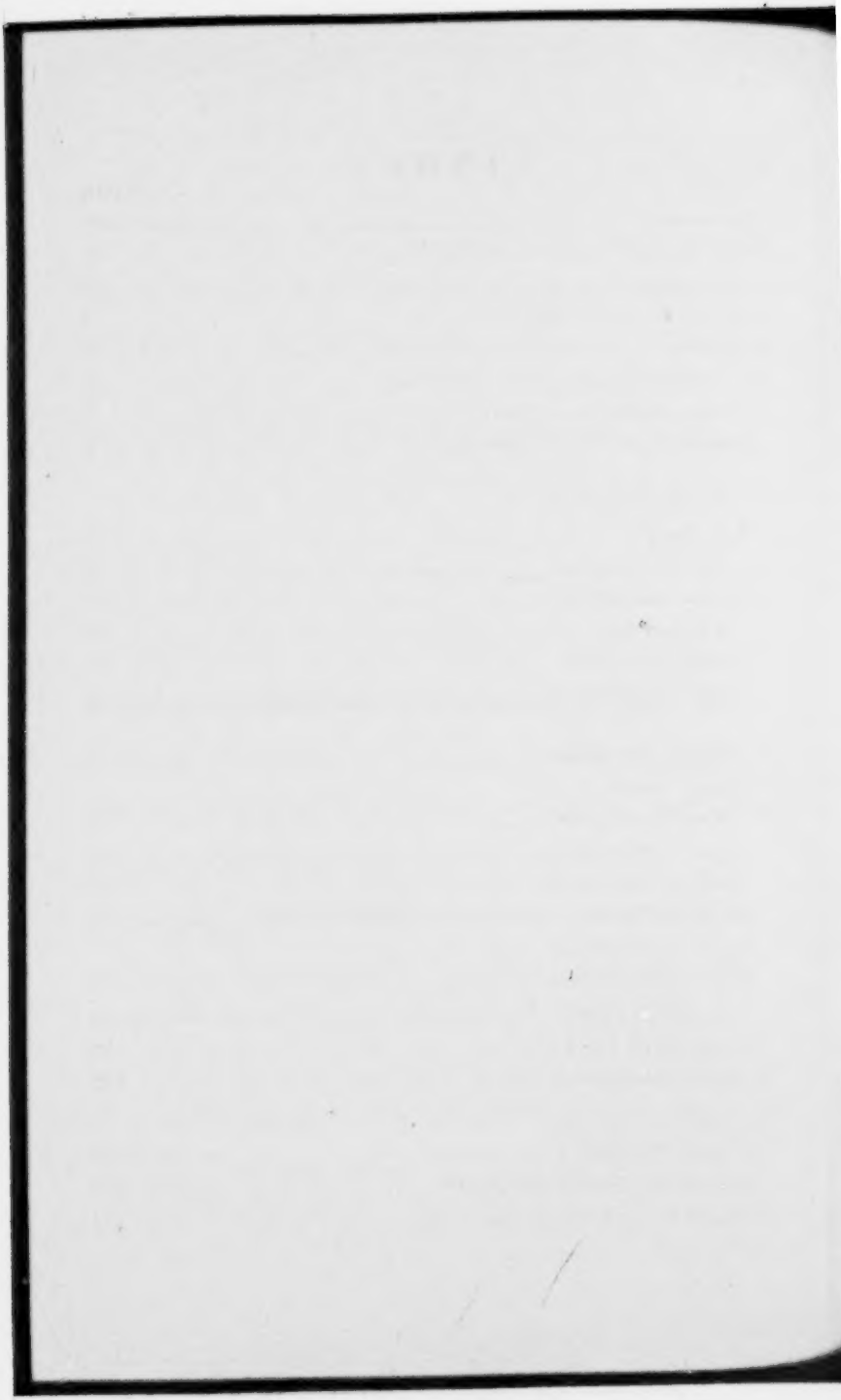

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Statement Under Rule 13, Subdivision 4

This is an appeal from a judgment of the United States District Court for the Eastern District of New York sentencing the appellant to two years' confinement in a penitentiary or other place designated by the Attorney General. The judgment is based upon the court's finding the defendant guilty of violating Section 11 of the Selective Training and Service Act of 1940.

By an indictment returned and filed in the United States District Court on February 19, 1946, the appellant was charged with having violated Section 11 of the Selective Training and Service Act of 1940. In the indictment it was alleged among other things that appellant unlawfully, wilfully, and knowingly failed and neglected to perform a duty required of him under said Act and the said Regulations, in that he failed and neglected to report for induction at the time and place fixed in an order to report for induction, contrary to the form of the statute in such case made and provided. (Selective Training and Service Act of 1940, Title 50, U. S. C. Appendix 311)

Defendant, having been arrested, was duly arraigned

before the United States District Court and admitted to bail in the amount of $2500. On such arraignment the defendant pleaded not guilty. A jury being expressly waived by defendant, the cause proceeded to trial before Honorable Clarence G. Galston, in the United States District Court for the Eastern District of New York on May 2, 1946. The evidence was heard, at the conclusion of which defendant's motion to dismiss and for judgment of acquittal was denied and the defendant was found guilty. On May 23, 1946, the defendant was sentenced and committed as above stated to the custody of the Attorney General for a period of two years in such place of confinement as the Attorney General may designate.

No costs were assessed.

On May 23, 1946, the defendant-appellant duly filed his notice of appeal.

The bill of exceptions and record on appeal has been duly prepared, agreed upon by counsel, approved, certified by the clerk and duly filed in this cause with this court.

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Docket Entries

[CR. 40941]

Feb. 19, 1946	Indictment filed.
	• • • • • • •
May 23, 1946	Before Galston, J. Deft. and counsel present. Deft. sentenced to 2 years without costs. Mr. Covington moves for setting of bail pending appeal. Motion denied.
" " "	Judgment & Commitment filed.
" " "	Cert. copy of judgment & commitment del'd. to U. S. Marshal.
" " "	Notice of appeal filed.
" 24, "	Clerk's Statement with copy of notice of taking of appeal mailed to circuit Court of Appeals.
" " "	Notice of taking of appeal mailed to Marshal and Warden, Fed. Det. Hdqrs.

Judgment and Commitment

[Filed in Clerk Office U. S. District Court, E.D. N.Y. May 23, 1946]

[Title of court and cause omitted in printing]

No. 40941

On this 23rd day of May, 1946, came the United States Attorney, and the defendant THOMAS BALOGH appearing in proper person, and by Counsel, and,

The defendant having been found guilty by the Court of the offense charged in the Indictment in the above-entitled cause, to wit: did unlawfully and knowingly fail and neglect to report for induction at the time and place fixed in notice received by him from the Local Board duly exercising jurisdiction in that behalf; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years, without costs.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(*Signed*) CLARENCE G. GALSTON

United States District Judge.

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Indictment

[Filed in Clerk Office U. S. District Court, E.D. N.Y. Feb. 19, 1946]

DISTRICT COURT OF THE UNITED STATES OF AMERICA
For the Eastern District of New York

VJF:BW

At a Stated Term of the District Court of the UNITED STATES OF AMERICA, for the Eastern District of New York, begun and held in the BOROUGH OF BROOKLYN, City of New York, within and for the District aforesaid, on the Sixth day of February in the year of our Lord one thousand nine hundred and Forty-six, and continued by adjournment to and including the nineteenth day of February, in the year of our Lord one thousand nine hundred and Forty-six

EASTERN DISTRICT OF NEW YORK, ss:

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that THOMAS BALOGH hereinafter called the defendant, on or about the 18th day of December, 1945, in the County of Kings, State and Eastern District of New York, and within the jurisdiction of this Court, being then and there a person duly registered pursuant to the Selective Training and Service Act of 1940, the Proclamation of the President of the United States Duly issued and promulgated on September 16, 1940 pursuant to said Act, did unlawfully, wilfully, and knowingly fail and neglect to perform a duty required of him under and in the execution of the said Act and the said Regulations; that is to say, notice having been theretofore duly given to said defendant by the Local Board duly exercising jurisdiction

in that behalf, requiring the said defendant to report for induction on the said December 18, 1945, he, the said defendant, did unlawfully, wilfully and knowingly fail and neglect to report for such induction at the time and place fixed in said notice; against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. (Selective Training and Service Act of 1940, Title 50, United States Code, Appendix, Section 311).

[signed] J Vincent Keogh VJF
United States Attorney
for the Eastern District of New York.
Cr. 40941

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Transcript of Testimony and Proceedings

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
v.
THOMAS BALOGH, Defendant

Brooklyn, New York, May 2, 1946.
Cr. 40941

Before:
HONORABLE CLARENCE G. GALSTON, U. S. D. J.

Appearances:
J. VINCENT KEOGH, ESQ.,
United States Attorney,
For the Government,
ANTHONY GRECO, ESQ.,
Assistant United States Attorney.
HAYDEN COVINGTON, ESQ.,
Attorney for the Defendant.

THE CLERK: United States of America vs. Thomas Balogh.

MR. GRECO: Government ready.

MR. COVINGTON: Defendant ready.

THE COURT: I understand that both sides have waived a jury. Counsel for the defendant has consented and the defendant has signed his consent.

THE DEFENDANT: Yes.

MR. COVINGTON: That's right.

MR. GRECO: Yes, your Honor.

THE COURT: Show him the consent.

(Clerk shows consent to defendant.)

THE COURT: Did you sign that, sir?

THE WITNESS: Yes, sir.

THE COURT: You waive a trial by jury and consent to be tried by the Court?

THE DEFENDANT: That's right, sir.

(Mr. Greco opens to the Court on behalf of the Government as follows:)

MR. GRECO: If your Honor please, the indictment filed on February 19, 1946 charges the defendant with the wilful failure to report for induction. The facts briefly are that this defendant registered on March 26, 1945, pursuant to the Selective Service laws of the United States, and subsequently filed his questionnaire and other papers requested by the Local Board, and on or about April 13, 1945 this defendant was classified 1A, and at that time he called to the attention of the Local Board the fact that he was a member of Jehovah witness sect and a minister of that sect and applied because of that for a 4D classification, and the Local Board thereafter, that is, after classifying him in 1A, sent the entire file to the panel of theological classification for the express purpose of examining this defendant regarding the claim that he was a minister. They did so—and by that I mean the panel of theological classifications—examined this defendant thoroughly, and the panel on or about October 1945—the exact date I do not know at the moment—mailed the entire file with the result of the examination to the Local Board, and, as your Honor well knows, the Local Board is the only one which can classify the defendant, and not the panel of theological classification. Soon after the receipt of the result of that examination from the panel this defendant's 1A classification was continued.

THE COURT: We shall suspend for a few minutes.

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(After recess.)

MR. GRECO: (Continuing) As I said, I was at the point where they continued the 1A classification, that is, the Local Board, and thereafter this defendant sought and obtained a hearing before the Local Board. He was heard by the Board and minutes of what transpired before the Board, that is, the questions and answers, were all recorded—they are part of the file—and after they heard him they continued the 1A classification. This defendant subsequently appealed to the Appeal Board, which by a unanimous vote of three to zero affirmed or continued the 1A classification, and, of course, as your Honor knows, under those circumstances, since there is no dissenting vote in the Board of Appeals this defendant cannot appeal to the President, and therefore all of his administrative remedies have been exhausted, and because of that, because rather the remedies have been exhausted, the Local Board sent him a notice to report for induction, sent him that notice on December 6, 1945, and he was to report on December 18, 1945. He failed to do so, and during all this period he contended that he was entitled to a 4D classification, and finally, since he did not abide by the Local Board's order to report for induction, he subsequently was indicted and is now before your Honor.

MR. COVINGTON: May it please your Honor, there is not much that I can add to the statement that Mr. Greco has made, except this, that the file in this man's case showed that he was eligible for exemption as a student, preparing himself for the ministry, under Section 622-44 of the regulations and also under Section 5D of the Act. We propose to show also that this man not only exhausted his administrative remedies under the Act, but that he also reported for a pre-induction physical examination at the armed forces headquarters and there was accepted, and that after being accepted, if your Honor please, he was sub-

sequently ordered to report for induction, and that he not only completed the administrative remedies under the Act and regulations, but he also completed the Selective Service process, and we propose to show that under the Falbo decision and the recent Estep decision the acts, conduct, regulations and orders of the administrative agency are invalid and for that reason the defendant should be acquitted and the finding of this Court should be not guilty.

THE COURT: Do you contest the statement made in the opening by the Government that the defendant failed to respond to the notice of the board to report for induction?

MR. COVINGTON: No, your Honor. I do not do that.

THE COURT: All right, Mr. Greco.

JOHN HARTE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRECO:

Q Mr. Harte, you are the chief clerk of the Local Board No. 194, I believe? A Yes, sir.

Q Have you a registrant named Thomas Balogh? A Yes, sir.

Q And have you now in your hands the original draft board file regarding this Thomas Balogh? A Yes, sir.

Q And was that file kept in the regular course of business? A Yes, sir.

Q And were the events depicted by that file made at or near the time that the events occurred? A Yes, sir.

Q Were they made, were the entries made, by one whose duty it is to make the entries? A That's right, sir.

MR. GRECO: I now offer that in evidence, your Honor.

MR. COVINGTON: The entire file?

MR. GRECO: That's right.

MR. COVINGTON: I have no objection, your Honor.

(Marked Government's Exhibit No. 1.)

Q Mr. Harte, can you tell us when this Thomas Balogh registered with your Local Board? A March 26, 1945.

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Q And can you tell the Court what transpired as briefly as possible since then? A The defendant registered on March 26, 1945. A Selective Service questionnaire was mailed to him on April 2, 1945 and was returned on the 13th of April 1945. The questionaire was examined by the members of the Local Board on that same date, and the registrant was classified 1A.

MR. COVINGTON: I was going to suggest to the witness that he state the date he was classified.

THE COURT: He may do that.

THE WITNESS: The questionnaire was examined by the Board on April 13, 1945, and on that same date, on April 13, 1945, the registrant was classified 1A. A notice to report for pre-induction physical examination was mailed to the registrant on the 16th of April 1945, the date of said examination being the 21st of April 1945. Following said examination the registrant was found qualified for general military service. On the 23rd of April 1945 the registrant in writing requested a hearing before the Local Board. On the 23rd of April 1945 the file of the registrant was forwarded to the advisory theological panel at Selective Service Headquarters for an opinion by that Board, by that panel. The file was returned on the 23rd of October. A transcript of the testimony was contained therein and an opinion of the panel given. On November 5th of 1945 the registrant appeared before the Local Board for a hearing. Following his classification, or following his hearing, his classification, 1A, was continued. On the 8th of November 1945 the 1A continued, classification card was mailed to the registrant. On 11/16/1945 the registrant made a formal appeal of his 1A continued classification. On the 23rd of November 1945 the complete file of the registrant was forwarded to the Board of Appeals. On December 3, 1945 the file was returned. The Board of Appeals decision was 1A affirmed unanimously, December 3, 1945. On December 6,

1945 the registrant was mailed an order to report for induction, the date of induction being December 18, 1945. On the 12th of December 1945 a letter from the registrant was received by the Local Board, requesting a postponement of further action pending investigation by National Headquarters, Washington, D. C. On that same date, December 12, 1945, a letter was mailed by the Local Board to the registrant notifying him that no further postponement would be granted without an official directive from Selective Service headquaters. On December 18, 1945, following the registrant's failure to report for induction, or rather, on 12/18/1945 the registrant failed to report for induction, and on the 28th of December 1945 the United States Attorney's office was notified of the registrant's delinquency.

Q If you look in the file toward the top I think you will find a letter by the Local Board, that is, a letter mailed to this defendant by the Local Board at the time or soon after the time he was to report for induction. Will you read that. A It is a carbon copy.

"December 18, 1945.

"Mr. Thomas Balogh,
112 Noble Street,
Brooklyn, New York:
"Dear Mr. Balogh:—

"You have failed to report for induction on December 18, 1945 as directed. If the cause was illness it is necessary that a letter from the attending physician be submitted to the Board. If not, an explanatory statement will have to be made in the presence of this Local Board. You are therefore directed to report to this Local Board immediately upon receipt of this letter. Failure to comply will constitute further action in this matter.

"Very truly yours,
Andrew J. Moran, Chairman."

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Q Did the defendant appear at the Board after that letter was sent? A No, sir.

MR. GRECO: Your witness.

CROSS-EXAMINATION BY MR. COVINGTON:

Q Do you have in the file a memorandum of what took place on the day that he appeared before the Local Board the first time? A The hearing, Mr. Covington?

Q Yes. A Yes.

Q What is the date that he appeared before the Board? A Monday evening, November 5, 1945.

Q What is the date of his classification? A His original 1A classification?

Q Yes. A April 13, 1945.

Q And when was it, please, that he requested a personal appearance before the Local Board? A On April 23, 1945.

Q And he did not have a hearing until November 5th; is that correct? A That's correct.

Q Why was the delay? A It was decided by the members of the Local Board that the file of the registrant should be sent to Selective Service Headquarters to the theological panel.

Q That's right. A And—

Q May I—

THE COURT: Let him finish his answer.

MR. COVINGTON: I did not intend to interrupt.

THE WITNESS: And the file was at Selective Service all that time.

Q Why was the file sent to the advisory panel, if you know, Mr. Harte? A Well, Mr. Moran, following the 1A classification of the registrant, asked if there had been any changes in the regulations regarding members of the sect, Jehovah's witnesses.

THE COURT: Who is Mr. Moran?

THE WITNESS: Mr. Moran is chairman of Local

Board 194. I told him that I had not seen any changes in the regulations, and Mr. Moran suggested then that the file be sent to the theological panel for an opinion, and he stated that, after all, there might be something in the regulations regarding this registrant.

Q And do you have the report of the theological panel there, please? A Yes, sir.

Q Will you please be kind enough to find that.

A I have it.

Q And may I have it for a moment, please.

A (Witness hands.)

Q Will you kindly look at this? Was there any correspondence between the Board and the New York City headquarters of Selective Service system relative to the return of the file from the panel board? A Yes, sir.

Q Tell us about that, if you please. You have that there, do you not? A The first letter was mailed on June 20, 1945. Shall I read the letter?

Q Well, if you can, tell us substantially what was said. A The substance of the letter is that Mr. Moran had asked for Mr. Balogh's file prior to this date, June 20, 1945. I told him it was at Selective Service Headquarters. He said, "It has been over there quite a while." He said, "I thought that they had meetings of the panel every two weeks." I said, "Yes. It was my understanding that they did." Mr. Moran, he says, "Well, John, suppose you call Mr. Agress or write him a letter and ask him just what has happened to the file. Ask him if the registrant has appeared for a hearing before the panel," and the letter was mailed on June 20th. I explained that the complete file of the registrant was forwarded to Selective Service headquarters on April 23rd, and as of that date, June 20, 1945, it had not been returned. I said when the file was forwarded it was the understanding of this Board that this matter would be taken care of and the file returned as promptly as possible.

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"A period of nearly two months has elapsed and as yet no action has been taken in this matter. It is therefore requested that you return the file to this Board at your earliest convenience."

Q After that the file together with this showing of facts which are clipped together—here we have a letter from the New York City headquarters addressed to Mr. Moran of the Local Board dated October 23, 1945, which is the date on which the file was returned; is that correct? A That's correct.

Q And it bears a stamp, November 5, 1945. What does that indicate to you? A What is the stamped date, please?

Q May I show it to you? A The letter, as you will note, the stamp of the Local Board is October 24th, the date on which we received this showing of facts—the stamp, November 5th, is the date on which this was presented with the file to the chairman of the Board.

Q I see. A It may be—excuse me—it may be the stamped date is the registrant's hearing before the Board. I think it is. Yes. It was on that date that the registrant appeared before the Board.

Q Do you have a memorandum of the hearing that was had on November 5th? A I have the transcript of the testimony.

Q Now, can you tell us whether or not the Local Board considered the testimony and evidence that Mr. Balogh gave on that occasion and gave him a full and fair hearing?

A First, Mr. Covington, the chief clerk of the Local Board is not present at the hearing and I couldn't—

Q You couldn't tell me that? A No, sir.

Q Well, the minutes show what took place; is that correct? A That's correct.

Q Before the decision was rendered by the Local Board to continue the classification can you tell us whether or not the Local Board considered all the evidence in the file

in arriving at its classification, including the report of the theological panel? A That is the usual way, Mr. Covington, they have to render a decision.

Q They did consider the report of the theological panel. That is what they wanted, wasn't it? They sent the case over to the theological panel, did they not? A Yes. They sent it to the Board for an opinion.

Q And they got what they wanted, the opinion; is that not correct? A They got the opinion of the panel, but then the registrant had a hearing before the Board and their own opinion is formed at the hearing.

Q And their opinion was formed on what they received at the hearing as well as what was in the file; is that correct? A That's correct.

Q Including the report of the theological panel; is that correct? A I imagine that would add to it, sir.

Q What date was it that Mr. Balogh was accepted by the armed forces after the pre-induction physical examination notice? A On April 21, 1945.

Q Did you mail him a certificate of fitness under the regulations, informing him that he had been accepted?

MR. GRECO: If your Honor please, I presume that Mr. Covington means the pre-induction physical examination.

MR. COVINGTON: That's right. That is what I have in mind, pre-induction physical examination.

A Yes, sir.

Q And do you have a report of the armed forces following the pre-induction physical examination? A Yes, sir.

Q That is in the file? A Yes.

Q And that report shows that he was accepted, as you have stated in your original testimony, for general military service; is that correct? A That's correct.

MR. COVINGTON: That is all, thank you.

MR. GRECO: Your Honor, maybe, perhaps I am

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confused in my mind, but Mr. Covington has been using the words, "Accepted by the armed forces." I would like the record to show that this man was examined only pursuant to a pre-induction notice sent to him, and that he was found physically fit—not accepted by the armed forces.

THE COURT: The use of the term by the attorney does not conclude the Court. The record on file will.

MR. COVINGTON: And, may it please your Honor, I believe I used the term "found acceptable to the armed forces for general military service." That is the term I used.

THE COURT: It sounded to me as though you used the word "accepted," and not acceptable. However that may be, the only thing that happened was that he was found in good physical condition and the Local Board was so notified; is that not so?

THE WITNESS: Yes, your Honor.

Q May I see a copy of the notice, please, of acceptance, notice of acceptance that was mailed to Mr. Balogh?
A (Hands.)

Q I show you, please, form 218, being the certificate of fitness, the original of which was mailed to the registrant, Thomas Balogh, and ask you to inform the Court what he is advised of in that notice?

THE COURT: I will read it myself and make my own interpretation. It says, "Physically fit and acceptable for general military service."

MR. COVINGTON: That is all.

THE COURT: But it does not state as you said, that he was accepted.

MR. COVINGTON: Your Honor, if I used the word, "accepted," I will change that to the word, "acceptable," but I thought that I said acceptable.

(Witness excused.)

THE COURT: All right.

ANTHONY P. LITRENTO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRECO:

Q Mr. Litrento, you are a special agent of the Federal Bureau of Investigation; is that right? A I am.

Q How long have you been such? A Over four years.

Q And in line with your duties did you interview this defendant? A I did. I interviewed him on January 18, 1946.

Q Can you tell us where? A I interviewed him in the office of Mr. Fererri, Assistant United States Attorney, in the Eastern District.

Q Was that interview reduced to writing? A It was.

Q And did you preface the interview by any admonition of any kind? A Yes. I said to Mr. Balogh that anything he might say could be used against him in court and he did not have to tell us anything.

Q And despite the admonition he spoke to you freely? A He expressed his willingness to talk to us.

Q And did this defendant affix his signature to the writing which was made pursuant to the interview? A He did.

Q Have you that writing with you? A I have (hands).

MR. GRECO: I now offer that in evidence, your Honor.

MR. COVINGTON: I have no objection.

(Marked Government's Exhibit No. 2.)

MR. GRECO: Your witness.

MR. COVINGTON: No questions.

MR. GRECO: The Government rests, your Honor.

MR. COVINGTON: Mr. Greco, can we not stipulate that all the material facts in the file were considered by the members of the Board in making the final classification of 1A, or shall I be compelled to subpoena the chairman of the Local Board, Mr. Moran?

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MR. GRECO: Well, I imagine that the entire file was considered by the Local Board in arriving at its 1A classification and I will so concede.

MR. COVINGTON: All the material parts, all the evidence?

MR. GRECO: The entire file.

MR. COVINGTON: Yes—the entire file. All right then.

THOMAS BALOGH, the Defendant, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COVINGTON:

Q Mr. Balogh, will you please state your full name. A Thomas Balogh.

Q And where were you born? A In Greenpoint, Brooklyn.

Q When? A March 25, 1927.

Q And what is the name of your father? A Charles Balogh.

Q And is he living or dead? A He is deceased.

Q When did he die, Mr. Balogh? A Well, he died before I was born.

Q And your mother? A Julia Balogh.

Q And is she living? A Yes.

Q What schools did you go to, Mr. Balogh? A I attended public School 22. Then from there I was transferred to Public School 31 and then from there I was transferred to the Junior High School 126, and there I graduated, and I attended Alexander Hamilton High School, and I was transferred from there to Newtown High School.

Q And when were you graduated from high school, please? A It was in June 1944.

Q Well now, if you will tell us, please, what courses did you specialize in in high school? A Commercial course.

Q And upon your graduation what did you do in the

way of work? A I got into the commercial line and secured a job as a bank clerk.

Q With what concern? A Empire Trust Company.

Q When did you go to work for them? A It was in June 1944, as soon as I got out of high school.

Q Mr. Balogh, when was it, please, that you first became interested in the work and activity of Jehovah's witnesses? A It was at least in 1942.

Q And in what way? A In what way?

Q Yes. How did you become acquainted with the work of Jehovah's Witnesses? A My mother has been associated with Jehovah's Witnesses since 1937.

Q And when did you—what caused you to take your interest in the work of Jehovah's Witnesses? A Well, I saw it was the truth and it was something to look forward to, security, happiness, and that is what everybody wants; so that is what I look forward to.

Q You look forward to what? A To the fact that I should take up the ministerial course and bring the glad message to them who are broken-hearted, so that they too would be happy and learn the truth.

Q When was it that you decided to study the work of Jehovah's Witnesses for the purpose of taking up the ministry that you have mentioned to the Judge? A After gaining some knowledge I started a ministerial course in September 1944.

Q September of 1944? A Yes.

Q And when did you begin to—

THE COURT: You were then 17 years of age?

THE WITNESS: In 1944 I was 16.

Q And, what, please, what assembly or school did you attend as part of your studies? A I attended the school of the Jehovah's Witnesses which we have in our assembly hall.

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Q Where is that? A It is situated at 3190 Steinway Street in Astoria, Long Island.

Q How long did you attend there? A I attended since September 1944.

Q And did you attend regularly? A Yes.

Q How frequently each week? A I attended—the ministerial course was on Thursday evening. I attended that, and there was a service meeting before that which I attended, and also our Watchtower study. We studied the Watchtower publications on Sunday.

Q Tell the Judge what courses of study you pursued in your ministerial study? A They were various. We had our regular text books, in other words, which dealt with all topics of composition, grammar, speech, Bible, Bible translations, different Bible translations, different kinds of religion, also on spelling, and how to make impromptu speeches, extemporaneous speeches, and many more subjects.

Q And in addition to that did you study the publication of the Watchtower of Jehovah's Witnesses to learn how to become a minister to preach its doctrines? A Yes, sir.

Q And what study did you take up on Thursday night at what you called the service meeting? A There it was to enable each of us to increase our knowledge and how to present this message to all the people in different ways.

Q Will you tell us what you studied on Sunday night at the school? A Sunday night we studied the Watchtower Publications.

Q Well, did you pursue any of your studies at home? A Yes, sir.

Q In preparation for the school study? A Yes, sir.

Q About how much time each week did you devote to study at home? A All my spare time was devoted to study.

THE COURT: Were you at that time working for the Empire State?

THE WITNESS: Empire Trust Company, yes, sir.

Q And you were devoting the rest of your time to this study work; is that right? A That's right.

Q In your statement here—

MR. COVINGTON: May I see the file, please.

(File handed to Mr. Covington.)

Q In the statement that you gave to the agent of the Federal Bureau of Investigation—may I show you that—in your statement you said that you joined Jehovah's Witnesses in April of what year? What does it say? A 1944.

Q And that is when you began to study regularly; is that correct? A That's right, sir.

Q And in your questionnaire you said that you were a student preparing for the ministry; is that correct? A That's correct, sir.

Q How long did you continue your study of the ministry before actually taking up preaching; when was it that you began preaching after pursuing your study for the ministry? A That was in January 1945.

Q And since January 1945 have you been regularly engaged in preaching activity? A Yes, sir.

Q And also since that time have you continued to pursue the courses of instruction that you outlined to the Judge here in your testimony? A That's correct, sir.

Q How frequently and often did you engage in your preaching activity, sir? A Well, on Sunday, Sunday morning we all assemble, various witnesses, on Sunday morning, and also during the week, Friday night, we have our call back meeting, which consists of calling on people of good will, who show interest in learning the message; so we call back on these people various nights of the week—sometimes we call back on Monday, but Friday night was a definite night on which we called back.

Q What work did you do on Saturday? A I was employed half a day Saturday, but in the evening I would

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go out on the street corner, work on the corners, standing on the corners, displaying the Watchtower and bring consolation to the public.

Q What is the principal method that Jehovah's Witnesses use in preaching the Gospel to the public? A The principal method that Jehovah's Witnesses use is that that Christ, Jesus, and His Apostles used; that is, going from house to house and displaying the message of God—also on the street corners where people assemble.

Q Is it your purpose to sell books or find people interested in the message? A To find people interested in the message.

Q And how do you find them? A We first call on the people, and then we explain the message of Jehovah, God, about His Kingdom, and then if they show signs of interest we leave a booklet or a magazine, or a bound book, whichever they request, and those interested we ask them for a contribution if they can afford it, and if they cannot afford any contribution we are always happy and glad to leave a publication free of charge.

Q And then after you have located such an interested one what do you do? What is your practice on that? A After we locate an interested person we make a definite night on which whoever can call back on them can do so so that their study can be arranged in the hall.

Q Is that done at the expense of the witnesses, you, the ministers? A It is done at our expense where time and effort is involved.

Q Do you charge them for making these studies in their homes? A No. We don't charge a penny.

Q What is the purpose of the study conducted in the homes of the people by you as a minister? A The purpose is to bring the people closer to the fellowship of Christ, Jesus.

Q And in addition to that you have pursued your

studies and the meetings of Jehovah's Witnesses at the assembly, have you not? A That's right.

Q Have you ever made any talks before the congregation? A Oh yes. It calls for each student to do that.

Q How often do you make talks? A We make a talk perhaps every few weeks, every three weeks or a month.

Q Have you regularly practiced your ministry each week since you began preaching in January 1945? A Yes, sir.

Q In this State? A Yes, sir.

Q Has it been your intention to go into this work full time? A That's right, sir.

Q Why haven't you done it before now, sir?

MR. GRECO: I object to why.

MR. COVINGTON: All right. I think it is before the Court. I would like to be answered on the question.

THE COURT: Proceed.

Q Why have you not? A Since I have been working I have been trying to save some money, because when a person devotes his full time to preaching he is known as a pioneer, and a pioneer depends on an allowance from home. Therefore I continued to work so that I could enable myself to have enough money to take up this preaching, because pioneers are sent to various parts of the country or city; so I thought I would be able to save up some money before I got up to preaching full time.

Q Mr. Balogh, when was it, please, that you registered with the Selective Service system? A It was on March 26, 1945.

Q And after you registered did you file a questionnaire? A That's right, sir.

Q And in that questionnaire did you inform the Board that you were a minister, that is, a student preparing for the ministry? A That's right, sir.

Q And that you also preached? A Yes.

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Q What classification did you ask the Board for, please? A I asked for 4D classification.

Q I show you Government's Exhibit No. 1 which has in it certain papers that are at the top and ask you to tell us now what happened after you filed your questionnaire. The questionnaire is at the top; isn't that correct? A That's right. After I filed my questionnaire I submitted a letter stating that I was a student preparing for the ministry.

Q Look at the paper just following that. Did you also file an occupational questionnaire? A Yes, sir.

Q Following that do you see any paper there? A That's right.

Q What is that? A In brief, I mentioned that I would like to have a personal appearance at the Local Board.

Q That is following the classification; isn't that correct? A It was just after I received my, before I received my questionnaire.

Q April 13th? A April 13th I think it was.

Q And following April 13th what did you do about it? What is the date of that letter that you have there? A The date at the bottom is April 23, 1945.

Q Yes, and what did you do on that occasion? What is that? A Shall I read it?

Q Just the substance of it, please. A It says, "In my recent letter addressed to the Board I tried to draw their undivided attention in reviewing my case so that a just decision would be the outcome and that I would be able to obtain a 4D classification," and also I made mention that I will present the Local Board with any evidence that would aid them in obtaining such a classification.

Q And then you asked the Board, did you not, for a personal appearance, is that correct? A That's right, sir.

Q After that, after making that request in writing when was it that you heard from the Local Board? A After that I received a letter from the Local Board in which they

said I should appear at the Association of the Bar in New York on May 9th for a hearing.

Q Is that not a letter commanding you to appear at the place that you have mentioned before the Panel Board; is that correct? A Yes, sir.

Q That has been mentioned by the clerk? A Yes.

Q Did you appear before that panel on that day? A Yes.

Q Who was there if you recall? I don't remember. There were several men.

Q Did anyone introduce you to them and give you their names? A No, sir.

Q Were you questioned? A Yes. I was questioned.

Q And you answered questions? A That's right.

Q Did you intend to give them all the facts that you have outlined here? A Yes, sir.

Q You see there, do you not, a letter that shows the report of that hearing? There is a letter. A There is a letter.

Q And it is attached to that as a report? A That's right, sir.

Q Now, after that appearance before the clergie panel of the New York City Selective Service system when was it that you next heard from the Local Board? A I did not hear from them until some time perhaps in November.

Q Yes, and then when you got word from them what was it? A I believe it was my draft card which said 1A continued.

Q Yes, and then what did you do after that, please? A After I received that I think I went to the Draft Board and I appealed. I signed the back of my questionnaire.

Q Did they give you another hearing? A Yes. I was granted another personal hearing.

Q And did you appear before the Local Board? A That's right. I appeared before the Local Board.

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Q And do you see the paper there showing a report of that? A Yes, sir.

Q All right now. Following that hearing what happened? A Following the hearing I received another classification, which was 1A affirmed.

Q And then you appealed; is that correct? A That's right.

Q The appeal was put through; isn't that correct? A That's right.

Q That was after the appearance the appeal went through and then you got word from the Local Board that the Board of Appeals had affirmed; is that correct? A Yes.

Q What did you do after that? A After that I received a notice to report for my induction.

Q Yes, but before that did you write any letters to the State or rather New York City headquarters asking them to appeal your case to the National Director? A You mean Washington; is that correct? A Yes, sir.

Q Did you write a letter to the Local Board on the subject too? A That's right.

Q See if you can find those letters in the file dated December 11th? A Yes. I have one of them here.

Q And another one addressed to Selective Service Local Board? A I have one here to my Local Board.

Q And this one addressed to the Director of Selective Service, Washington—all right—hand the papers to the bailiff for a moment. I show you, please, a letter, and ask you to identify that; is that the copy of a letter which you wrote to National Headquarters? A That's right, sir.

MR. COVINGTON: I offer it in evidence.

MR. GRECO: I object on the ground that it is a self-serving declaration and irrelevant.

MR. COVINGTON: May I make this observation in answer to what counsel has said? The purpose of this being introduced at this time, your Honor, is to show that

this man attempted to secure a review by National Headquarters in order to exhaust his remedies.

THE COURT: Was that something that he was required to do under the Act?

MR. COVINGTON: Well, it is not something that he was required to do, your Honor, but it was a matter of discretion that rested in the Director. He did not have a right to appeal as a matter of right, but the Director had a right to review his matter, as a matter of discretion, and the only way he could set that in motion was to write a letter to the Director outlining the facts and asking him to exercise his discretion, and I call attention to the file in that respect. He made the request of the Director and the Director denied it.

THE COURT: You may put in also the reply, if you have it, and I will accept both letters.

MR. COVINGTON: Your Honor, I do not have the letter in response to it.

THE COURT: Why isn't it there? You have a copy of the letter that you wrote.

MR. COVINGTON: Yes.

Q Did you get an answer to the letter? A No, sir. I never received that answer.

THE COURT: Where is it? The answer would not be in the file of the Government. The answer would be in his possession.

MR. COVINGTON: He said he did not receive any answer, your Honor.

THE WITNESS: I did not.

THE COURT: How do you know it was denied?

MR. COVINGTON: Just the mere fact that he received no answer, your Honor, would imply a denial.

THE COURT: How do you know the letter was received?

MR. COVINGTON: Well, I will lay that predicate.

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Q Mr. Balogh, did you place the original of this letter in an envelope that was securely sealed and stamped with the proper number of stamps in the Post Office of the United States? A Yes, sir.

MR. COVINGTON: Then I will say that due process of mailing would prove delivery, your Honor.

THE COURT: I will receive it.

(Marked Defendant's Exhibit A.)

Q Mr. Balogh, when you got the order to report for induction what, if anything, did you do? A Well, after that I didn't know what to do because I wrote the letter to Washington and I was waiting for a reply; so therefore I thought best if I didn't report pending a reply from Washington, and then after that I received a letter from the Draft Board requesting that I appear before them and state the cause of my not reporting for induction.

Q When was that, if you recall? A Well, the date for induction was December 18th; so it might have been a few days after that.

Q You were expecting National Headquarters to take some action on your request; is that correct? A That's right, sir.

Q And it was during that time that you received the order to report; is that correct? A That's right, sir.

Q And you were supposed to report on December 18th? A Yes, sir.

Q I show you the original of the letter written on the Local Board's stationery addressed to you and signed by the clerk or rather the chairman. When did you get that letter? A When? It has December 18th on top.

Q And after you got the letter that is referred to there what did you do? A After I received the letter I tried to get in touch with the Local Board. It was during the Christmas holidays, and for a whole week I tried to get in touch with the Board, but it seemed every time I got

there they were closed. This was after working hours; so they were closed every time I tried to get in touch with them.

Q That letter that you have in your hand, what is that? A It says here I have failed to report for my induction.

MR. COVINGTON: May I have it. (Hands)

MR. GRECO: No objection.

THE COURT: The copy is in the file.

MR. COVINGTON: Yes. The copy is in the file.

THE COURT: You don't have to duplicate any Exhibit.

MR. GRECO: The offer is withdrawn, your Honor.

MR. COVINGTON: It is withdrawn, your Honor, because I found a copy in the file. That is all.

THE COURT: We shall take a short recess.

(After recess.)

CROSS-EXAMINATION BY MR. GRECO:

Q Now, Mr. Balogh, I show you part of Government's Exhibit 1, particularly a letter addressed to you by the Local Board, dated December 18, 1945. You received the original thereof, did you not? A That's right, sir.

Q Will you read that letter out now.

THE COURT: He doesn't need to do that. I will read it.

MR. GRECO: I want to bring out certain facts.

THE COURT: I will read it.

Q By that letter, Mr. Balogh, the Local Board asked you in effect to explain why you did not appear for induction; is that right? A That's right.

Q And I believe you told your attorney that you tried to communicate with the Local Board? A That's right, sir.

Q When did you receive the letter? A Well, a few days after I received my notice to report for induction.

Q Can you give us an idea? A Perhaps December 20th.

Q And did you thereafter attempt to communicate with the Local Board? A That's right.

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Q Personally when did you try to do so? A I think it was a few days after that.

Q When? A Do you want the exact date, sir?

Q Yes, or an approximate idea. A It must have been about December 25th or some time later. It was during the Christmas holidays.

Q When did you say? A About December 25th or around that time.

Q Well, was it on December 25th? A December 25th.

Q That is Christmas day, is it not? A Well, December 20th—perhaps December 20th. I am not sure of the date.

Q I am trying to get an idea from you. You say you called at the Local Board. I didn't. I want to know from you. When did you call—December 20th? A About that time, sir.

Q And what time was it that you went to the Local Board offices? A It was after I got out from work after 5.

Q What time did you quit work? A 5 o'clock.

Q And what time did you get to the Local Board? A It must have been at least 5:30.

Q And was anyone there? A Yes, but they had a sign on the door, "Local Board is closed for this evening."

Q The door was locked you say? A Yes.

Q That was on December 20th you say? A Yes.

Q And did you make any other attempt? A I went every day that week.

Q Tell us what day after the 20th? A Probably December 20th and 21st.

Q Do you recall what day of the week December 20th was? A I believe not, sir.

Q When was the next time you went there? A The following day, the 21st.

Q And what time did you quit work that day? A Usual time, 5 o'clock, sir.

Q And what time did you get to the Local Board? A 5:30.

Q And what happened? A The usual sign was on the door there, Local Board is closed in the evening.

THE COURT: Did you try to telephone?

THE WITNESS: No, sir.

Q Did you ever write? A No. I didn't write.

Q You are now employed by the Empire Trust Company, are you not? A That's right.

Q How long have you been employed there? A About a year and a half.

Q Were you so employed during the year 1945? A That's right, sir.

Q What are your duties there? A I am a bank clerk.

Q Is there a telephone accessible to you? A That's right, sir.

Q What are your hours there? A 9 in the morning until 5 in the evening.

Q And during 1945 I presume you worked each and every week, did you not? A That's right, sir.

Q Five days a week? A Five and a half days.

Q Monday to Friday and then a half day Saturday? A Saturday.

Q How late do you work on Saturday? A Until 12:30.

Q Were you a pioneer of the Jehovah's Witnesses sect in December 1945? A No. I was not a pioneer.

Q When do you say you were ordained a minister? A Well, I was actually ordained a minister when I was baptized. That was on April 29th of last year.

Q 19— A 1945.

THE COURT: Is there a formal ordination in your sect?

THE WITNESS: There is a formal ordination.

THE COURT: That differs from what has been stated to me in other Jehovah's Witnesses' cases.

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Q Usually you immerse yourself in water and you thereafter proclaim yourself a minister; is that correct? A You see, from those letters—

Q Will you just answer my question. A When you are baptized, that is right, sir.

Q And you proclaim yourself a minister then? A Yes.

Q You do that yourself? A Under the guidance of someone else there.

Q Who baptizes you? A Some of the other ministers, sir.

Q You swore to the questionnaire on April 13, 1945—do you recall? A Yes.

THE COURT: That is already in the record.

Q Now, you said after the Panel Board hearing you received a notice that your classification 1A was continued; is that correct? A That's right, sir.

Q Are you sure about that? A Quite certain, sir.

Q Or did you get a card? A I received a card.

Q Wait a minute. Did you receive a card to appear before the Board for a hearing? A I believe I received a card first, which mentioned that I had been placed in 1A continued. I am quite sure that is what happened first.

MR. GRECO: That is all of this witness.

THE COURT: Anything more of this witness.

REDIRECT EXAMINATION BY MR. COVINGTON:

Q Will you please explain to his Honor how it is that the ordination ceremony is performed? What does it take for a man to become an ordained minister? Does he have to prepare himself first? A Oh yes. He has to prepare himself first. Yes, sir.

Q In what way? A First, he must really put his mind to it, that he is going to take part in all this work, and then he becomes active in preaching the Gospel. Those are steps leading up to the ordination.

Q Does it require study? A Oh yes. It requires much study.

Q And any preparation? A Yes—preparation.

Q After having gone through the preparation study and you have entered into a covenant to do this work what is the ceremony? What takes place at the time or before a man becomes baptized or ordained as a minister? A Before he is baptized he devotes himself to the power of the word of Jehovah, God, and he knows that he is bound to do this work, and after he is baptized he enters into a binding agreement to do the will of Jehovah, God.

Q Who performed the ordination ceremony in your case? A A minister who is authorized to baptize.

Q Where was that done? A This was done at 425 Carlton Avenue, Brooklyn.

Q Were any people there? A Yes. There were much people there.

Q At the ceremony? A Yes.

Q Were any talks offered prior to that? A Yes.

Q And was that part of the ceremony? A Yes, sir.

Q Did the Watchtower Bible & Tract Society and Jehovah's Witnesses recognize you after that as being an ordained minister? A That's right, sir.

Q Prior to that time you were a student preparing for the ministry; is that correct? A Yes, sir.

Q As you stated in your questionnaire? A Yes, sir.

MR. COVINGTON: I believe that is all.

MR. GRECO: That is all, your Honor.

MR. COVINGTON: Your Honor, while they are putting their proof on I have no other witnesses, but I would like to get two law books, if I could borrow them for use here in court on the motion, and I would like to see them.

THE COURT: I am not concerned with that stage yet. Does the defendant rest?

MR. COVINGTON: We rest now.

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THE COURT: Is there anything more.

MR. GRECO: Yes. I have a rebuttal witness, your Honor.

JOHN HARTE, recalled by the Government in rebuttal, having been previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRECO:

Q Mr. Harte, if you recall, this defendant was classified in 1A some time in April 1945; is that correct? A That's correct, sir.

Q April 13th, is it? A April 13th.

Q And thereafter I believe he requested a hearing pursuant to the regulations; is that correct? A That's correct.

Q And the Local Board referred this matter to the Panel of Theological Classifications; is that right? A That's correct.

Q And the Panel of Theological Classifications interviewed this defendant and subsequently sent the entire file to the Local Board; is that correct?

THE COURT: Why do you repeat all this?

MR. GRECO: I am laying a foundation.

THE COURT: Ask the question.

Q After the file was returned to the Local Board by the Panel of Theological Classifications what did the Local Board do with regard to—question withdrawn—This defendant testified that he received a card continuing his 1A classification after his appearance at the Panel of Theological Classification in the latter part of October or early part of November; is that so? A No. That is not correct.

Q Will you tell us what really transpired then? A The file was returned from the Panel. The file was then given to the Chairman and the members of the Board, and the members of the Board asked me to send a card to the registrant to have him appear at the Board for a hearing.

Q Pursuant to his request in April? A Yes.

Q And did you yourself mail that card? A I mailed that card.

Q Was there any continuance of his 1A classification at this point? A No, sir.

Q And pursuant to the request of the Local Board this defendant did appear on November 5, 1945; is that correct? A Yes, sir.

Q After that hearing his 1A classification was continued? A That's right.

Q And he subsequently, as he previously testified, appealed to the Appeal Board? A Yes, sir.

Q Was your Local Board open particularly from December 18th to the end of December 1945? A Well, on work days, yes, sir.

Q What were your hours? A From a quarter of 9 until 5:30.

Q And in the evening? A And from 7 until 9 on Monday evenings.

Q Throughout the period of December 18th to the end of December 1945 particularly; is that correct? A Yes, sir.

Q You yourself were there? A No, as I said before, there were holidays; there were days that were holidays, but on working days I was there during that period.

Q I don't mean Christmas Day or New Year's Day, but on work days when the office was supposed to be open were you there? A Yes.

Q Did you ever see this defendant up here there? A No, sir.

MR. GRECO: That's all.

MR. COVINGTON: No questions.

MR. GRECO: The Government rests.

THE COURT: What books do you want, Mr. Covington?

MR. COVINGTON: I would like to get 149 and 151 Fed. (2d).

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THE COURT: Let me have the questionnaire, the whole file.

MR. COVINGTON: At this time, if the Court please, the defendant makes a motion for judgment of acquittal on the grounds that the undisputed evidence shows that he has exhausted all of his administrative remedies and completed the Selective process and is now in a position to challenge the legality of the order to report for induction as well as the proceedings before the Selective Service system, and as grounds for challenging the validity of the proceedings of the Selective Service system and the order to report and as grounds for a directed verdict or a motion for judgment of acquittal the defendant says that the undisputed evidence shows that he is a student and was a student at the time he registered, preparing himself for the ministry, and as such was entitled to classification in Class 4D; that thereafter during the history of his proceedings he became a minister of the Gospel, being formerly ordained a few weeks after his registration and filing his questionnaire, and that the undisputed evidence therefor shows that he is a regular and duly ordained minister of Jehovah's Witnesses, Watchtower Bible & Tract Society, having been recognized as such at all times while his case was before the Selective Service system, that there is no evidence in the file to show that he was not a minister, and that he was not a minister as claimed; that the classification and action of the Selective Service system, Local Board as well as Board of Appeals, was arbitrary and capricious. Such classification was made without any basis in fact. It was made in excess of the jurisdiction and authority of the Local Board, in that the undisputed evidence showed that he was a student preparing for the ministry at the time he registered and a minister at the time he was finally classified by the Board of Appeals; that the Draft Board, the Board of Appeals and the Se-

lective Service system therefor denied his procedural rights without due process of law in holding that he was liable for training and service, without regard to the evidence and in defiance of the undisputed evidence; also on the grounds that the proceedings of the Selective Service system were void and violated the rights of the defendant without due process and contrary to the regulations, because the Draft Board gave consideration to and relied upon a determination by the Theological Panel, which Panel is not authorized by the Selective Service regulations. They continued their classification upon the opinion of this Theological Panel, which is contrary to the regulations. They acted on the opinion and suggestion of the Panel. The opinion of the Theological Panel was not and is not proper evidence, inasmuch as it followed an erroneous theory and led the Board into an erroneous classification and conclusion. The Local Board and the Board of Appeals in consideration of the recommendation of the Theological Panel considered, therefore, evidence which was not properly a part of the file, and in that respect they violated the procedural regulations. There is no authority for the forming of an opinion by the Theological Panel and its being considered and relied upon by the Selective Service system. The defendant's rights under the regulation and the acts were violated, and also his rights to due process as guaranteed by the Fifth Amendment were violated, and such action on the part of the Board in considering the opinion and recommendation of the Panel is contrary to the holding of the United States Circuit Court of Appeals for the Third Circuit in the case of United States vs. Pierson, reported in 151 Fed. (2d) at page 801, and also the opinion of the United States Circuit Court of Appeals for the Second Circuit in the case of United States ex rel Levy v. Cain, reported in 149 Fed. (2d) at page 338.

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THE COURT: We shall take an adjournment until 2 o'clock, at which time I will announce my decision on the motions, and during the recess I shall more leisurely read the contents of Government's Exhibit No. 1.

(Recess taken until 2 p. m.)

AFTERNOON SESSION

THE COURT: Do you want to be heard, Mr. Greco?

MR. GRECO: Yes. I would appreciate it, your Honor.

MR. COVINGTON: May I have an opportunity to reply, your Honor?

THE COURT: I cannot tell you yet.

MR. GRECO: If your Honor please, it is my opinion that this case falls squarely under the Falbo case, that is, Falbo vs. United States. Counsel for the defendant has pointed out two cases to your Honor, the Levy and the Pierson cases, and it is my opinion that they have no bearing whatever in this case. Assuming arguendo that they have, I want to point out, as your Honor well knows, that the Levy and Pierson cases involved a writ of habeas corpus, and that the defendants had reported for induction and had been sworn in and were in the Army, and, as your Honor very well knows, under those circumstances the Draft Board's qualification could be attacked. In this case the defendant is not in the Army, and, as I said a moment ago, it falls squarely under the Falbo case and the classification of the Draft Board could not be attacked.

THE COURT: Since the Falbo case there has been the Estep case, which presents a rather different situation, as I recall it, because Mr. Justice Douglas wrote that there is no advantage in subjecting the defendant to two bites of the cherry, and I am prepared to follow the admonition in the Estep case and therefore consider the whole

record and not distinguish between a habeas corpus proceeding and an indictment charging violation of the Selective Service Act.

MR. GRECO: It is pointed out to your Honor that in the Levy and Pierson cases the Panel was not disclosed to the registrant after demand by the registrant, and, further, the Panel I believe recommended that the defendant's claim for Class 4D classification be denied and that his 1A be continued, and that was done immediately after the hearing of the Panel of Theological Classifications. Here, as your Honor recalls, there was no testimony to the effect that any demand was made upon the Panel for the disclosure of the persons who sat on the Panel, and, if I recall correctly, the record that was sent to the Local Board from the Panel disclosed the names of the persons who sat and examined this defendant, and it is beyond the realm of probability that this defendant was not introduced to the members.

THE COURT: Whether he was or whether he was not, I don't think we can speculate about it. He says he did not know who they were, but as a matter of fact the witness said that the record disclosed that the members of the Panel, the names of the members of the Panel, were disclosed to the defendant.

MR. GRECO: And another thing, if I recall correctly, also when the Panel sent the minutes of what transpired before them with regard to this defendant they also did not make any recommendation whatever, but left it entirely to the discretion of the Local Board who summoned the defendant before them and examined him again, after which he was put in 1A, or rather his 1A classification was continued. In other words, the Panel did not render any opinion whatever. They merely acted as an agent, so to speak, to take the testimony. These experts took certain testimony; they examined this defendant regarding reli-

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gious questions, and they thereupon sent the findings in the form of questions and answers to the Draft Board and instructed the Draft Board that they were the ones after examining the result as to what transpired before them to decide the classification of this defendant, and immediately thereafter the Local Board, as the testimony shows, summoned this defendant before them pursuant to the request made by this defendant back in April for a hearing. They did give him a hearing on November 5, 1945, and they then went into this question about his ordination, as your Honor knows, by the evidence and other questions as to when he was supposedly ordained and what he did, and all questions along his religious claim or contention. After that the Local Board continued his 1A classification; so that there is no usurping of powers by the Panel of Theological Classifications of the Local Board. You have, in fact, additional evidence from the Panel Board to the Local Board which is authorized under the regulations, particularly Selective Service regulations 602-2, 602-3, and 602-4 to accept voluntary services on technical questions; in other words, they rely upon some authoritative person to render an opinion on technical matters, and I believe, your Honor, as I said a moment ago, that assuming arguendo that this case falls within the Estep case and the others cited I think there is no basis to the contentions that have been advanced by the defendant's attorney.

MR. COVINGTON: May it please your Honor—

THE COURT: Now, I don't want any repetition of what you told me before. If you have something new to offer, all right, but if you are just going to repeat it won't be of any aid at all.

MR. COVINGTON: No. I do not intend to repeat. I made my formal motion at the end of the case and I expected that you would permit me to argue the matter.

THE COURT: You did argue it. You cited authorities.

MR. COVINGTON: I cited them as part of the motion. I did not get to arguing the case. I do not intend to repeat anything.

THE COURT: Go ahead.

MR. COVINGTON: The Theological Panel has no authority whatsoever to make a recommendation or to decide whether a man is qualified or not. That is a matter that should be, a function, your Honor, that should be exercised only by the Local Board under the Act and under the regulations. Now, if you will read the record of the Theological Panel it certainly discloses that they analyzed this man's case from an orthodox viewpoint. The Theological Board did not follow the Act and the regulations in deciding whether or not this man was a minister, and in making their findings and in making their conclusions and recommendations. I say that the law exempts students who are preparing themselves for the ministry and ministers, and a regular minister is one who regularly teaches and preaches the doctrines and precepts of any organization. The evidence shows that this young man regularly taught and preached it. The evidence also shows that at the time he filed his questionnaire he was training himself to be a minister in his organization.

Now, if your Honor please, I would like to point out that the classification of one as a minister should not be dependent upon the views of another organization, and that is exactly what this Board did and exactly what the Panel did. They did not apply the rules and standards of the Selective Service system in determining whether or not this man was a minister. They applied the standards of the orthodox churches such as the Catholic and Presbyterian church, ones who employ a non-evangelistic method of teaching and preaching. They entirely ignored the fact that throughout all history there are two types of religious organizations, one that is essentially orthodox,

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whereby the method of preaching is done by a minister to a congregation from the pulpit, and the other, the unorthodox primitive method. They did not consider the unorthodox and primitive method of preaching which was employed by Christ-Jesus and the Apostles and which is at present employed by many, many different missionary societies today in this land and today throughout the whole world, for that matter. There are many missionaries that are going from house to house and State to State. They have no congregation. They are itinerary missionary evangelists and preach to the people, and that is the type of organization that we have here, and if you will read its findings you will see that the Draft Board and the Theological Panel applied the wrong standards entirely, and they ignored the fact that the Selective Service regulations, and the National decision of the Selective Service system applies not only to the orthodox organization but to the unorthodox organization, and when you apply the orthodox method to the unorthodox method, Jehovah's Witnesses, the orthodox to the evangelistic type, then it is arbitrary and discriminatory, because it is eliminating them from any possibility of consideration for exemption under the Act, and I say that Jehovah's Witnesses are exempt under the Act and regulations because they are employed regularly in teaching and preaching. Regularly does not mean that a man has to devote his full time to it, your Honor. It means that he does it regularly once a week, twice a week or three times a week, and throughout history you can read decisions not only in this country but in England where the question of what constitutes a minister has been considered and uniformly it has been held that it does not mean that a man has to devote his full time to his missionary evangelistic or ministerial work. He can work during the week, and even the Second Circuit has intimated that in the Cain case, that a man can be a

minister and at the same time employ himself in clerical work during the week to protect himself and to support himself, and that is exactly what this man did, and I can take an illustration now: Congress exempted ministers. Congress deferred Judges. Take this situation just as an analogy, if the Court please: Congress deferred Judges. Now, just take the case of yourself, please—

THE COURT: Leave me out of it, will you please.

MR. COVINGTON: Just take the case of a man—your Honor, I am going to draw an analogy—take the case of a man who is a Judge, and he lives on a farm, owns a farm and operates a farm where he stays and looks after his investment. He spends considerable time on it. Yet he is able to perform his judicial functions regularly and properly. So Congress did not make any provision that a man that is a member of the judiciary who is active or who is industrious has no right to indulge in other activities on the side. And so when that classification was passed the law exempted ministers. They did not confine it to ministers that were full time ministers and who had large congregations which were able to support them, but Congress intended that it should apply to all ministers of any denomination, and it says regular ministers, and regular does not mean full time. It means regular, consistent, periodical, and the Court in Re Cain by the Second Circuit Court of Appeals specifically held that a man that preaches once a week on Sundays and works on a farm during the week to support himself was a regular minister of religion within the meaning of the Act. The British courts have held under the present Selective Service Act in Canada that a man that worked all during the week and preached on Sunday was a minister under their Act, and under the 1917 Act the Court of Appeals of England held that a man that was a lawyer's, a solicitor's clerk, for six days a week could still be classified as a minister because he

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preached on Sunday. So I say that does not apply only to the orthodox method, and the Draft Board and the Theological Panel pursued the wrong method in classifying this man, and it is because the Theological Panel applied the wrong method, the orthodox method, eliminating entirely the primitive method of preaching which is still employed regularly throughout the whole world by a large number of organizations, because of that they violated the rights of this registrant and the right of procedural due process was denied. It is up to the Board, and it should have followed the law and the regulations, but, on the contrary, they followed the Theological Panel, and there is where the error lies, and we come squarely within those two cases, and I say that this man is a minister who teaches and preaches in the same way as Christ Jesus, and furthermore this case is a lot different from other cases. This man claims exemption as a student preparing for the ministry, and there is no testimony to the effect that he was not such a student preparing for the ministry, and therefore upon the basis of that I say the motion should be sustained and this defendant should be acquitted.

THE COURT: During the two sessions, the morning session and this rather late afternoon session, I have studied the grounds of this motion, with a careful examination of the facts, including the questionnaire. I have read with particularity the citation in United States ex rel Levy v. Cain, 149 Fed. (2d) 338, and the case of United States v. Pearson, 151 Fed. (2d) 801. I do not find it difficult to distinguish the facts in this case from those cases. There was no change in the classification of this Draft Board from the original classification made on April 13, 1945. It is true that there was a reference to the Advisory Board on Theological Classifications, but the members of that Panel did not remain anonymous—a point stressed in the Cain case in the Second Circuit. They were George H.

Richards, Dr. David E. Roberts, Reverend James E. Robinson. But most persuasive of all is the fact that, though the report of that Panel was sent to the Chairman of the Local Draft Board, there is nothing in the record that the Draft Board was persuaded by any opinion expressed therein. On the contrary, I have read the minutes of the hearing of November 5, 1945 before that Draft Board when the registrant was questioned by the Chairman, Moran, and by Mr. Murvish, who I take to be a member of that Board, and in it I find no reference whatever to the report of the Panel. At the conclusion of the hearing there appears this paragraph: "It is the opinion of the members of this Local Board that this registrant is not entitled to a classification of 4D. Classification of 1A continued, in due course." Nor is there anything in the file before me which shows that either in the examination, or hearing rather, before the Local Board on November 5, 1945, or in the conclusion reached by the Local Board any reference to the proceedings before the Panel or its report. So it was open to the defendant to procure by subpoena the attendance of the members of that Board and offer testimony on that question, and that was not done. It was not the duty of the Government to add to the proof which it gave and on which it rested.

Since the facts in this case do not fall within the Cain case, or the Pearson case which followed the Cain case, I am persuaded that the law of the Falbo case applies, as modified by the Estep case, and in consequence the remaining question is whether the defendant had a full and fair hearing by the Local Board and therefore he exhausted all of his remedial rights. There is no question in my mind at all that he was accorded a full and fair hearing; nor is the conclusion possible that the consideration by the Local Draft Board or the Board of Appeals was in any way arbitrary or capricious. It isn't for this Court to say whether

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the Local Draft Board reached a correct judgment, but since they violated no rights of the defendant to a full and fair hearing, and, since there isn't the slightest suggestion of an arbitrary or capricious action taken by that Draft Board, my verdict is that the defendant is guilty.

MR. COVINGTON: Your Honor, may I call one matter to your attention in view of a remark that you made while delivering the opinion? You stated that there was nothing in the evidence to show that the Draft Board considered the statement of the Theological Panel. Did I understand you correctly?

THE COURT: I don't know what you understood me to say.

MR. COVINGTON: I believe that is what you said. I should like to call your attention to the fact that we stipulated this morning that the members of the Board considered everything that was in the file in reaching its determination, and I called upon the District Attorney to so stipulate so as to avoid the necessity of calling the members of the Board to show that they did consider the recommendation of the Theological Panel, and that stipulation was agreed to this morning. You adverted to the failure of the defendant to subpoena members of the Board, and I would like to call your attention to the fact that it was stipulated.

THE COURT: I don't know whether the Government intended by that stipulation to say that the report of the Panel was considered by the members of the Local Draft Board in reaching its decision. My understanding is that the stipulation goes so far as to say that the report of the Panel was submitted to the Board. Now, if there is anything more than that I don't so understand.

MR. COVINGTON: May we have the stipulation read, please.

MR. GRECO: If I recall correctly, it was stipulated

by the Government and conceded that the Draft Board took into consideration the entire file. To what extent, of course, we do not know.

THE COURT: We shall have the stipulation read.

(Following read by Reporter from page 18:)

"MR. COVINGTON: Mr. Greco, can we not stipulate that all the material facts in the file were considered by the members of the Board in making the final classification of 1A, or shall I be compelled to subpoena the Chairman of the Local Board, Mr. Moran?

"MR. GRECO: Well, I imagine that the entire file was considered by the Local Board in arriving at its 1A classification and I will so concede.

"MR. COVINGTON: All the material parts, all the evidence?

"MR. GRECO: The entire file.

"MR. COVINGTON: Yes—the entire file. All right then."

THE COURT: You are right, Mr. Covington, in calling my attention to the terms of that stipulation, and, viewed in its broad aspects, it doubtless would have relieved the defendant from calling the members of the Draft Board in order to ascertain by examination of them at the trial whether the members considered that report of the Panel. However, conceding that you were by virtue of the stipulation of the Government relieved from calling the members of the Board to prove so much, there still remains the outstanding and convincing exhibit which shows the independent examination by the members of the Local Board of this defendant at a hearing which he had requested, and you can read that transcript from beginning to end without finding anything therein which shows that the members of the Board were influenced in the slightest degree by the report of the Panel.

MR. COVINGTON: May I ask—I believe the minutes

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of the hearing—I am not arguing with you about your decision. I just would like to call these facts to your attention for what they may be worth. May I suggest to your Honor that the minutes of the hearing that was had following the classification does not reveal, nor do the regulations require the Board to reveal, everything that they considered in reaching the conclusion that they did as to classification; so they have discretion undoubtedly after the hearing, like the Court would, an Appellate Court enjoys in reaching a decision. They don't have to tell us what they considered, but we know that this Board did consider this report, and the minutes of the hearing do not prove that they did not consider it, if it please your Honor.

THE COURT: I am afraid I cannot go along with you in that respect.

MR. COVINGTON: I merely make that suggestion to you for what it may be worth.

THE COURT: I cannot consider it of any worth. It was stated by Judge Learned Hand in the Cain case, which was the thing undoubtedly that influenced the decision of the Circuit Court of Appeals in that case: He said "A member of the Board at that time told him that he had been 'heard by a group of the most prominent men of the Jewish faith in the great City of New York. It was their decision, and they are bound by it (they being the members of the Draft Board) that you belong to the United States Army.'"

Another significant passage in Judge Learned Hand's opinion is this: "Although there is no evidence as to how far the 'panel's' report influenced the Board's reclassification of the relator in class 1A, we do not know that it had something to do with the result because of the chairman's answer to the relator's uncle that they 'were not wholly guided by the suggestion of the panel board.'"

And then, of course, so far as the case in the Third

Circuit is concerned, that stressed the matter that the Advisory Board was cloaked in anonymity. The majority opinion goes on to say, "Its statement not being signed and the identity of its membership not being disclosed to the relator or appearing in the record of the proceedings before the Local Board."

I will impose sentence on this defendant some time later, so as to have the probation officer prepare a presentence report.

MR. COVINGTON: I was going to ask, your Honor, if you would permit the defendant to remain at large on bail until sentence.

THE COURT: Oh yes.

MR. COVINGTON: May we have the sentence next Tuesday? That seems to be the only day that I can be free next week. I will be out of town after that.

THE COURT: I don't know whether the probation officer will be ready.

MR. COVINGTON: Maybe next Friday.

THE COURT: May 10th.

MR. COVINGTON: Very well.

THE COURT: May 10th. Mr. Greco, let the probation officer know about this. Bail will be continued in the meantime.

MR. GRECO: Bail will be continued in the meantime, $2,500.

THE COURT: Yes.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Gerald Braddick
Official Court Reporter
U. S. District Court

EXHIBITS

Government's Exhibit 1

[in evidence]

[Immaterial portions of each document reproduced below are omitted in printing. Handwritten or typewritten material is distinguished from wording of printed form by *italics.*]

COVER SHEET

[DSS Form 53]

Name *Balogh Thomas*
Address *112 Noble St Brooklyn Kings* (County) *N. Y.*
Order No. *12666* Serial No. *W-492*
Date of registration *3-25-27* [sic]
Date of birth Month *3* Day *25* Year *27*
Marital status (Enter "S" or "M") *S*
1A mailed 4/13/45
1A cont'd mailed 11/8/45
B of A decision 1A-affirmed 3-0 mailed 12/3/45

• • •

SELECTIVE SERVICE QUESTIONNAIRE

[DSS Form 40]

[Page 1]

• • •

Date of mailing *April 2, 1945*

Name: *Thomas Balogh*

• • •

This questionnaire must be returned on or before *April 12, 1945*

[signed] *Andrew J Moran* Member of Local Board

• • •

[Page 2]

STATEMENTS OF THE REGISTRANT

• • •

Series III.—EDUCATION

1. I have completed *8* years of elementary school and *4* years of high school.

2. I have had the following schooling other than elementary and high school: *None*

3. I *can* read and write the English language.

Series IV.—PRESENT OCCUPATION OR ACTIVITY

1. I am now [*x*] working at the job described under No. 2 below.

2. (a) The job I am now working at is *Office Clerk*

(b) I do the following kind of work in my present job: *I am a window clerk; I take in all various kinds of securities.*

(c) I have had *10 months* experience in this kind of work.

• • •

[Page 3]

(e) In my present job, I am [*x*] a regular or permanent employee, working for salary, wages, commission, or other compensation; I have worked *10 months* in my present job, and expect to continue indefinitely in it.

(f) I *am not* now employed in national defense work.

(g) My employer is *Empire Trust Co. 120 Broadway New York 5, N. Y.* whose business is *Banking*

(h) Other business or work in which I am now engaged is *None*

• • •

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[Page 4]

Series VI.—OCCUPATIONAL EXPERIENCE, QUALIFICATIONS, AND PREFERENCES

1. I have also worked at the following occupations other than my present job, during the past 5 years: *None*

2. My usual occupation, or the occupation for which I am best fitted, is *Office work*

3. I *am not* licensed in a trade or profession.

• • •

Series VII.—FAMILY STATUS AND DEPENDENTS

1. I am [*x*] single.

• • •

3. (a) The following is a list of all members of the family group in which I live:

Name		[*]
Thomas Balogh		*$ 990*
Mrs. Julia Balogh	*female 50 mother*	*676*
Daniel Balogh	*male 25 brother*	*1800*
Helen Balogh	*female 23 sister*	*1700*

[*] Amount this person earned by work during past 12 months.

(b) I contributed *$400* during the last 12 months to the support of the above-listed family group.

• • •

[Page 6]

Series VIII.—MINISTER, OR STUDENT PREPARING FOR THE MINISTRY

1. (a) I *am* a minister of religion.

(b) I *do* customarily serve as a minister.

(c) I have been a minister of the *Jehovah's witnesses* since *9/44*

• • •

2. (a) I *am* a student preparing for the ministry in a theological or divinity school.

(b) I am attending the *Watchtower Bible & Tract Society* which was established *before* September 16, 1939, and is located at *(Unit) 31-90 Steinway Ave. Astoria, L. I.*

Series IX.—CITIZENSHIP

1. I was born at *Greenpoint New York U. S. A.*
2. I was born on *March 25 1927*
3. My race is: [*x*] White
4. I *am* a citizen of the United States.

• • •

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class *4D.*

• • •

[Page 8]

Registrant sign here *Thomas Balogh*

Subscribed and sworn before me this *13th* day of *April* 1945.

[signed] *John M. Harte Chief Clerk*

• • •

MINUTE OF ACTION BY LOCAL BOARD No. *194,* COUNTY *Kings,* STATE *N. Y.*

The local board classifies the registrant in Class *1,* Subdivision *A,* by the following vote: Yes *3,* No *0*

April 13, 1945 *Andrew J Moran* Member

APPEAL TO BOARD OF APPEAL

I hereby appeal to the board of appeal from the determination of the local board.

11/16/45 *Thomas Balogh* *Registrant*

• • •

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MINUTES OF OTHER ACTIONS

~~*11/10/45*~~ 4/23/45	*File to N. Y. C. Hqtrs.—Mr. Agress. 4/26/45 Form 218 mailed.*
11/5/45	*Registrant before Local Board—1A continued Andrew J Moran*
11/23/45	*File to Bd of Appeals No. 31.*
12/3/45	*File Returned from Board of Appeals.*
12/3/45	*B of A. decision 1A affirmed (3-0) P. M.*
12/28/45	*Registrant reported to U. S. Attorney's office as delinquent P. M.*

MINUTES OF OTHER ACTIONS—SUPPLEMENT

[DSS Form 40-S]

Registrant's name *Thomas Balogh* Order No. *12666*

DATES	
3-26-45	*Date of Registration*
4-2-45	*Questionnaire mailed.*
4-13-45	*Questionnaire returned*
4-13-45	*Questionnaire examined by Board. Registrant classified 1A.*
4-16-45	*Notice to report for Preinduction Physical Examination mailed.*
4-21-45	*Date of examination. Registrant found qualified.*
4-23-45	*Registrant requests hearing before Board.*
4-23-45	*File of registrant forwarded to Advisory Board Theological Panel Selective Service Headquarters for opinion.*
10-23-45	*File returned. Transcript of testimony contained therein and opinion of Panel given.*
11-5-45	*Registrant appeared before Local Board. Classification 1A continued.*
11-8-45	*1A continued card mailed.*
11-16-45	*Registrant makes formal appeal of 1A continued Classification.*
11-23-45	*Complete file of registrant forwarded to Board of Appeals.*

12-3-45	*File returned. Board of Appeal decision 1A-Affirmed—Unanimous 3-0*
12-6-45	*Registrant mailed Order to Report for Induction on December 18, 1945.*
12-12-45	*Letter from registrant received requesting postponement of further action pending investigation by National Headquarters, Washington, D.C.*
12-12-45	*Letter mailed to registrant notifying him that no further postponement will be granted without official directive from S.S. Headquarters.*
12-18-45	*Registrant failed to report for induction.*
12-28-45	*U. S. Attorney notified of the delinquency.*

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To whom it may concern:

Having just turned eighteen, I understand as required by law, that I am to report to my local draft board in regard to military service. However, in conforming to this law, I would like to present a few important facts regarding my case, so that a proper and just decision may be reached and the proper classification given me.

During the past few months, I have been engaged in a sincere study in ministerial training since September 1944. The purpose of this course on my part is but for one objective in mind, that I may please the Lord my God and serve Him with my full heart and soul. It is to the end that I may be a thorough and efficient minister of the Gospel and preach His message of hope.

The course that I have undertaken in reaching this desire, is prescribed by the Watchtower Bible and Tract Society. In attaining the proper knowledge and information in this respect, an intense study is necessary on my part in which study is undertaken in the confinement of my home, and at the meeting place of Jehovah's witnesses —other authorized representatives of the Watchtower Society, which meeting place is located at 31-90 Steinway Avenue, Astoria Long Island City.

During my course of study, and particularly since January 1945, I have from time to time gone into the ministerial service with various ministers of the Watchtower Bible Society, with myself participating therein.

Because of my sincereness and enthusiasm in engaging in such activities, my conduct has met with approval, and that I may continue in such activities without interference, I have been presented a card of authorization, which you will find enclosed herein.

Being engaged in such ministerial work therefore and ever bettering myself in becoming a more capable minister

of the Lord, it is my humble opinion that I should be classified as such.

Local Board No. 194 23
Kings County 047
APR 13 1945 194
698 Manhattan Ave.
Brooklyn 22, N. Y.

In this, I take the privilege of referring you to;

Vol. III Opinion No.14 (Amended)
National Headquarters
Selective Service System

Subject: Ministerial Status of Jehovah's Witnesses Section 622.44;

"Class IV-D: Minister of religion or divinity student."

In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

However, if this letter should prove wholly inadequate in informing you thoroughly of my position you might find it advisable to get in touch with the local unit of Jehovah's witnesses at the above mentioned address, or if you wish I shall be glad to appear before you to answer any questions that you deem necessary.

Trusting you to consider my case with due solemnity and awaiting a reply I am

Very Sincerely Yours,
Thomas Balogh
Local Board No. 194 23
Kings County 047
APR 13 1945 194
698 Manhattan Ave.
Brooklyn 22, N. Y.

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To Whom It May Concern:

In my recent letter addressed to the local board, where I had than performed to draw your undivided attention and sincerity in reviewing my case, I find since that day, that I have been given a classification of IA, which was not what I had expected, since, in view of the facts I had previously presented personally to the board, had not received a personal hearing of any extent whatsoever. Therefore I request that I be given a personal hearing, so that I can relate to the board an honest account of my activities as a Jehovah's witness, and therefore the board can determine what shall be undertaken in respect to my case.

I shall be prepared to present the board true facts at anytime, also conclusive proof of my activities and conduct during the past months. I therefore wait upon reply of the board to a set date of my appearance.

Very sincerely yours

Thomas Balogh

Thomas Balogh.

Local Board No. 194 23

Kings County 047

APR 23 1945 194

698 Manhattan Ave.

Brooklyn 22, N. Y.

Order to Report
Preinduction Physical Examination

SELECTIVE SERVICE SYSTEM
[DSS Form 215]

April 16, 1945

The President of the United States,
To *Thomas - Balogh 12666*
Greeting:

You are hereby directed to report for preinductio physical examination at
American Legion Building, cor. Greenpoint & Manhatta Avenues, Brooklyn, New York at *8:30 A.* m., on the *21s* of *April*, 1945

Andrew J Moran

IMPORTANT NOTICE TO REGISTRANT

Registrant who believes he has a disqualifying defect.– If you believe that you have some defect which will disqua ify you for service you may, on or before the *18th* day o *April*, 1945, appear in person at the office of the Loca Board, or, if you are unable by reason of such defect t personally appear, you may submit an affidavit from reputable physician or an official statement by an autho ized representative of a Federal or State agency to th effect that such physician has personal professional know edge or such authorized representative has official knowledg of your defect, the character thereof, and that you ar unable to personally appear due to the character of the de fect. The Local Board may send you to the Local Boar examining physician, and, if it does so, it shall be your dut to appear at the time and place designated by the Loca Board and to submit to such examination as the examinin physician shall direct. If the Local Board determines tha your defect does disqualify you for service you will receiv a notice of Classification (Form 57) advising you that yo

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have been placed in Class IV-F. Unless prior to the date fixed for your preinduction physical examination, you receive such a Notice of Classification (Form 57) advising you that you have been placed in Class IV-F, you must report for your preinduction physical examination as directed.

Every registrant.—When you report for preinduction physical examination you will be forwarded to an induction station where you will be given a complete physical examination to determine whether you are physically fit for service. If you sign a Request for Immediate Induction (Form 219), and you are found qualified for service, you will be inducted immediately following the completion of your preinduction physical examination. Otherwise, upon completion of your preinduction physical examination, you will be returned to this Local Board. You will be furnished transportation and meals and lodgings when necessary. Following your preinduction physical examination you will receive a certificate issued by the commanding officer of the induction station showing your fitness for service or lack thereof.

If you fail to report for preinduction physical examination as directed, you will be delinquent and will be immediately ordered to report for induction into the armed forces. You will also be subject to fine and imprisonment under the provisions of section 11 of the Selective Training and Service Act of 1940, as amended.

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this order and go immediately to that Local Board and make written request for transfer for preinduction physical examination.

REPORT OF PHYSICAL EXAMINATION AND INDUCTION

[DSS Form 221]
[Page 1]

GENERAL MILITARY SERVICE

Local Board No. 194 2
Kings County 04
APR 21 1945
698 Manhattan Ave.
Brooklyn 22, N. Y.

1. Name *BALOGH Thomas*

2. Present address *112 Noble Street, Brooklyn, Kings, New York*

• • •

16. (a) Number of times previously sent to Induction Station *0*

• • •

[Page 2]

SECTION II.—LOCAL BOARD EXAMINATION AND CLASSIFICATION.

• • •

20. (a) . . .

(c) This local board has classified the above-named registrant in Class *1A*

• • •

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CERTIFICATE OF FITNESS
[DSS Form 218]

• • •

Thomas Balogh 12666

I hereby certify that the above-named registrant has been given a preinduction physical examination and found:

1. [*x*] Physically fit, acceptable for general military service.

• • •

(Date of examination) *APR 21 1945*
Name *Edgar Montville*
Induction Station Commander
EDGAR MONTVILLE, CAPT., *A. U. S.*
. . . . *G. C. P. New York 17, N. Y.*

• • •

April 23, 1945

Selective Service Headquarters
1 East 44th Street,
New York, 17, New York

attn: Mr. Agress
re: THOMAS BALOGH
Order # 12666

Dear Sir:-

Enclosed find file of the above named registrant for an opinion by the Advisory Board-Theological Panel.
Would you kindly aknowledge receipt by signing and returning the enclosed copy of this letter. Thank you for your kind cooperation.

Yours very truly,
Andrew J. Moran,
Chairman.

encl: Form 53 (complete file)
ajm: cg

Receipt of the above file is hereby acknowledged.
Theda P. Scheine
Legal Section
NYC Hq.

SELECTIVE SERVICE
NEW YORK CITY HEADQUARTERS
1 EAST 44TH STREET
NEW YORK CITY 17

REFER TO FILE: 19:59: slm May 3, 1945

Mr. Thomas Balogh
112 Noble Street
Brooklyn, New York

Subject: Order No. 12666
Local Board 194

Dear Mr. Balogh:

The Local Board has forwarded the file in your case to this Headquarters for administrative review.

You are requested to appear at the Association of the Bar of the City of New York, 42 West 44th Street, New York City, in Room 605 next Wednesday, May 9th, 1945 at 4:00 P. M. for a special hearing relative to your eligibility for classification in Class IV-D.

You will be given an opportunity at that time to discuss your status and submit any additional information you may deem pertinent.

For the New York City Director
J. R. Agress
J. R. Agress
Chief, Legal Section
Manpower & Operations Division

LD: 157

SELECTIVE SERVICE
NEW YORK CITY HEADQUARTERS
ADVISORY PANEL ON THEOLOGICAL
CLASSIFICATIONS

Date: May 9, 1945
Subject: Thomas BALOGH

Local Board 194
Order No. 12,666

The registrant claims IV-D classification on the ground that he is a student preparing for the ministry in a theological or divinity school of Jehovah's Witnesses recognized as such for more than one year prior to the date of enactment of the Selective Service Training and Service Act. In his Selective questionnaire, filed April 13, 1945, registrant claimed that he is a minister of religion, but upon examination before this Panel he stated that he was "not yet" a minister.

Section 5d of the statute provides:

> "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Section 622.44 of the Regulations provides that *regular and duly ordained ministers of religion* shall be classified in Class IV-D and defines these terms as follows:

> "A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, with-

out having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"A 'duly ordained minister' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

It seems to us that the word "minister" was used and intended by Congress in the ordinary accepted use of the term to mean one duly set apart from the body of members to perform special duties.

In the nomenclature of Jehovah's Witnesses the word minister seems to be applied to every member. Those who are set apart for special duties are designated by other titles, for example, company servant, assistant company servant and backcall servant. Not all such special duties are peculiarly religious. Some of them are administrative, such as might be performed by a stock clerk, or a superintendent, or a sales executive.

To take an example from one of our larger denominations, there are many persons set apart for special duties in the Methodist Book Concern, who do not and could not claim exemption as ministers.

To take a different example from another sect, in any ordinary Quaker "Meeting" ("Meeting" being apparently the word which the Quakers use to describe what other denominations would call an individual "church"), religious duties are laid equally upon, and religious functions are performed equally by members of the Meeting; but none of these can claim to be a minister within the meaning of the Selective Service Act, because none of them is set apart from the others to perform such functions.

The necessity of distinguishing the statutory meaning

of a word from the meaning which may be given to it by some particular body is not confined to the Selective Service Act. The various statutes of inheritance give to the "Brothers" of the deceased certain rights of inheritance. Many organizations throughout the country use the word "Brother" to describe what we would ordinarily call a member of the organization. Such peculiar use of the word by the organization does not give the members the right to inherit as brothers under the statutes of inheritance.

It is a favorite saying among Presbyterians that they are all kings and priests unto God, reference being made to a verse in the Book of Revelation. It would not seriously be contended however that every Presbyterian member is a priest and as such entitled to IV-D classification.

Therefore, to decide whether a Jehovah's Witness is a minister within the meaning of the Selective Service Act, it is necessary to disregard entirely the use of the word "minister" by the registrant and by other members of his sect; and to study whether he has been set apart from his fellows for special duties and functions, and if so whether those special duties and functions are those of a minister as that word is intended by Congress in the Selective Service Act.

Clearly one of his duties is to preach and teach his religion. That, however, is the duty and practice of all members of the sect; and, therefore, that duty and function in no way sets him apart from the other members. The separate duties, which do set apart some of Jehovah's Witnesses from the others, are, so far as we have thus been able to learn, those of an administrative or business nature.

Though there seems to be no ceremony or rite whereby one Jehovah's Witness may be constituted a minister apart from his fellows, it remains a possibility that one of them by his own habits of life might be set apart, if he devotes all of his time to teaching or preaching the reli-

gion. Therefore, if a Jehovah's Witness claims IV-D classification, the Local Board should ascertain whether by his own course of life he has become entitled to a special status—apart from most Jehovah's Witnesses—as a minister by reason of the amount of time he gives to teaching and preaching the religion of his sect and not merely the performance of the administrative duties thereof.

From examination of the registrant it appears that what he calls a theological or divinity school is a course of study held in local churches or companies as they are called in the nomenclature of Jehovah's Witnesses, and is not a theological school in the sense in which these words are ordinarily understood and in the sense in which, in our opinion, the statute intended.

An additional fact of significance is that registrant stated he devoted only six hours per week to these studies. He further stated that there was no regular beginning and ending for any course, that attendance was voluntary and that completion of such course was not essential in order to become a minister or servant.

In these circumstances the Panel is of the opinion that the registrant is not a full-time student preparing for the ministry in a recognized theological or divinity school within the meaning of the statute and the Regulations; nor does it appear that registrant is a minister of religion in the traditional sense of the term.

NEW YORK CITY HEADQUARTERS
HEARING BEFORE ADVISORY PANEL ON
THEOLOGICAL CLASSIFICATIONS

May 9, 1945
Subject: Thomas BALOGH
Local Board 194
Order No. 12,666

Q. Your name is Thomas Balogh?
A. Yes.
Q. From Local Board 194?
A. Yes.
Q. Order No. 12,666?
A. Yes.
Q. Are you a Jehovah's Witness?
A. Yes.
Q. You claim IV-D classification?
A. Yes.
Q. You are already a minister?
A. Not yet.
Q. When will you become one?
A. As soon as I finish my course.
Q. When do you hope to do that?
A. As soon as I feel I know enough Bible to tell others.
Q. When did you begin to study that course?
A. In January, some time about then.
Q. When did you first become interested in Jehovah's Witnesses?
A. I started to attend regularly their meetings in September. Besides my mother has been in the witness work for seven years and I go with her to meetings too.
Q. I asked one Jehovah's Witness when he became a Jehovah's Witness and he said when he began attending meetings. Now I will ask you the same question.
A. A man becomes a Jehovah's Witness when he knows

he has fully consecrated his life to the will of Jehovah God but from the heart, not in vain.

Q. Has that happened to you?
A. Yes.
Q. That happened, when?
A. That happened when I started attending the meetings.
Q. About September?
A. Yes.
Q. Have you been immersed?
A. Yes. I did not have the opportunity before, that is why I didn't put it down. Sunday, April 29, 1945.
Q. Does that make you a minister?
A. Not necessarily.
Q. Assuming you became a minister, when will you know you are a minister, or how?
A. When you think you have enough knowledge of the Bible then you know you are a minister.
Q. Are you taking a course of study in the Theocratic ministry?
A. Yes.
Q. Is this course lead by a Theocratic ministry servant?
A. Yes.
Q. What is his name?
A. Brother Johnson.
Q. Are you given title of servant?
A. No, but I take active part in the course. I make speeches.
Q. Do you know the name of your company servant?
A. Brother Carlson.
Q. What is the name of your particular company?
A. Kingdom Hall. Just that and the address.
Q. No specific name?
A. The Astoria Unit.
Q. Was the place where you are receiving your theological instruction recognized as a theological seminary a year before Selective Service?

A. Yes.
Q. This Kingdom Hall that is the place where you worship?
A. Yes.
Q. In what respect does your course in theological study differ from Sunday school in Methodist, Protestant, or Baptist churches? Why is yours a theological study and theirs a Sunday school church?
A. I was a Protestant and attended Sunday school. In theological school we get right down to the work and, therefore, that was our purpose.
Q. How old do you have to be to be a member?
A. No limitations.
Q. How old is the youngest member?
A. 13
Q. When you say that this place where you take your theological studies was a recognized theological seminary, who recognized it as such?
A. The Watchtower Society.
Q. Do they recognize this specifically as a theological seminary?
A. They recognize it as a place of learning and worship.
Q. Was this particular school functioning in September, 1939 as far as you know?
A. It probably was.
Q. Were courses given there of the type you now take as far back as 1939?
A. I think so.
Q. When you applied for admission to that course, were you required to make any commitment about practicing the ministry?
A. Full time or a greater part of your time.
Q. Did you have to agree to become a pioneer?
A. No. It is up to the person himself.
Q. People who are not ministers could chose the course?
A. It is up to them.

Q. How many students are ministers?
A. About 15.
Q. How many students are not ministers?
A. The balance cannot be claimed ministers.
Q. Give us approximate amount? Half and half?
A. No, more ministers. Fifteen who are and 10 are not.
Q. About how much time per week or month do you devote to your instructions?
A. Tuesday night we study in a home. We study from the Bible. Thursdays are service meetings. Sunday morning we go witnessing and Sunday evening we have the study of the Watchtower magazine.
Q. Do you do any backcalling?
A. No, not yet.
Q. Do you register for any particular term or period when you attend these courses or do you just come when you are able to do so.
A. When you are able to do so.
Q. There is no special attendance?
A. You go if you could. No one makes you do what you do not want.
Q. There are no formal classes?
A. That is correct.
Q. Are you marked absent when you are absent?
A. Yes.
Q. Do I understand that by the fact that you have applied for a IV-D classification as a theological student that you regard this course you take as justifying your classification in IV-D just as much as in the case of a man who is taking 15 hours of regular class room instructions in a theological seminary. Do you think you have as much right to be classified in IV-D as any full time student in one of the theological seminaries in the City?
A. Yes, I think I have the right and privilege of being classified in IV-D.

Q. Do you consider yourself a full-time student?
A. The reason I asked for a IV-D was that I may continue my study.
Q. In the opinion of Jehovah's Witnesses, are you taking a full-time course of study in preparing for the ministry?
A. Yes.
Q. Do you earn your own living?
A. Yes.
Q. How do you earn it?
A. Empire Trust Company.
Q. How many days a week?
A. Five and a half.
Q. How many hours a day?
A. Eight.
Q. How many hours a week do you take instruction in class?
A. One hour on Tuesday evening, Thursday evening 2 hours, Sunday evening 2 hours and Sunday morning 2 or 3 hours witnessing work.
Q. About six hours a week?
A. Yes.
Q. You see an ordinary student in a seminary school studies 15 hours a week in class and under ordinary circumstances is not earning his living by any secular employment.
A. We study at home too.
Q. So does the student of a seminary school. I am talking about the hours spent in class.
A. Our Hall contributes to the up-keep of the hall and pays for books and booklets and, therefore, it is given out of our own pocket.
Q. If there were a man studying at a seminary 6 hours a week he would not be eligible for IV-D classification for he would not be a full-time student. Do you think it is fair to refuse him a IV-D but grant you one?

A. As I mentioned before, I would like to continue m
study without interference and, therefore, I should ge
a IV-D classification.

Q. I asked you if you thought it is fair to refuse him an
give it to you?

A. It is hard to determine.

Q. Is it fair or is it not?

A. I have no answer to that.

Q. When you furnish [*sic*] [properly, *finish*] that cours
will you have any greater authority as a minister tha
you have now?

A. No more.

Q. Will you have greater authority within the Jehovah'
Witnesses to perform rites or to officiate at ceremonies

A. Someone could be appointed to be a company servan
and backcall servant or you might be given the priv
ilege of calling on people.

Q. Could that occur in the case of a Witness who did no
take this course?

A. It could.

Q. Do you have authority to perform marriages?

A. No.

Q. What servants have that authority?

A. That I do not know.

Q. Thank you Mr. Balogh. You will hear directly fro
the Local Board 194.

June 20, 1945

Selective Service Headquarters,
1 East 44th Street,
New York, 17, New York

attn: Mr. Agress
re: Thomas Balogh
Order No. 12666

Dear Sir:-

On April 23, 1945 the complete file of the above named person was forwarded to your office for an opinion by the Advisory Board of the Theological Panel. When the file was forwarded, it was the understanding of this Board that this matter would be taken care of and the file returned as promptly as possible. A period of nearly two months has elapsed and as yet no action has been taken in this matter. It is therefore requested that you return the file to this Board at your earliest possible convenience.

Very truly yours,
Andrew J. Moran,
Chairman.

ajm:eg

Hearing 11/5/45 7:30 P.M.

SELECTIVE SERVICE
NEW YORK CITY HEADQUARTERS
1 EAST 44TH STREET
NEW YORK CITY 17

REFER TO FILE: *59: fps* October 23, 1945

Mr. Andrew J. Moran
Chairman, Local Board No. 194
698 Manhattan Avenue
Brooklyn 22, New York

Subject: Thomas BALOGH
Order No. 12,666

Dear Mr. Moran:

At the request of this Headquarters the above named registrant appeared before the appropriate division of our Advisory Panel on Theological Classifications. Transcript of registrant's examination by the panel, together with the panel's report in the matter, are enclosed herewith.

Registrant appeared before the following PANEL members: Mr. George H. Richards, Dr. David E. Roberts and Rev. James H. Robinson.

While the panel's report should be considered together with the other information in the file, the responsibility of determining the registrant's status rests in the first instance with the Local Board, and the Board's determina-

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tion in every case must be predicated upon the exercise of its own deliberative and independent judgment.

For the New York City Director
J. R. Agress
J. R. Agress
Chief, Legal Section
Manpower & Operations Division

Enclosures

Local Board No. 194 23
Kings County 047
OCT 24 1945 194
698 Manhattan Ave.
Brooklyn 22, N. Y.

SELECTIVE SERVICE SYSTEM
Local Board No. 194 23
Kings County 047
NOV 5 1945 194
698 Manhattan Ave.
Brooklyn 22, N. Y.

Thomas Balogh, Order No. 12666, appeared before the Local Board on Monday evening, November 5, 1945.

Oath taken by Mr. Mervish.

Mr. Moran. You are Thomas Balogh, Order No. 12666?
A. That's right.
Q. You reside at 112 Noble Street Brooklyn?
A. Yes.
Q. Do you still object to induction?
A. That's right.
Q. You object to induction in the armed forces of our country?
A. That's right.
Q. What is your objection based upon?

A. I have made a consecration to serve God and to carry that out.

Q. Are you familiar with the fact that there are thousands of men who are Chaplains who have also consecrated themselves to serve God and who are able to follow their religious instructions and still give service to their country?

A. Well that is their thought. I have one thought in mind and that is to serve God and not man.

Q. Don't you think it would be possible for you to serve God in the armed forces as well as a civilian? Don't you think it may be possible for you, in following your religious practices, to possibly do some good for the men in the armed forces whom you may be serving with by bringing your teachings to them? Wouldn't it be possible for you to bring them the word of God while serving with them and at the same time serve your country?

A. I have made a consecration to serve God alone.

Q. You are employed at the present time?

A. I am.

Q. What is your employment?

A. Clerk for the Empire Trust Company.

Q. Have you ever made any attempt to bring your religious teachings to any of your co-workers?

A. A few times I have mentioned it.

Q. You work every day?

A. Five and one-half days a week.

Q. Of the hundreds of days you go to your employment throughout the year you say that you have only a few times tried to instill your religious teachings into the minds of your fellow-workers. Don't you believe you ought to bring your teachings to all whom you come in contact with?

A. The office is not a proper place because everyone is guided by his conscience. They don't have the time to

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learn. I talked to one of the fellows and I brought him some literature to read.

Q. How many people are employed with you?

A. I am in the main office.

Q. They must employ hundreds and yet you say that you have only brought the subject of your teaching up two or three times?

A. The office isn't the proper place.

Q. When would you become a minister of Jehovah's Witnesses?

A. I started in the ministerial course beginning in January 1945. I had been going to the Watch Tower Society for years back with my mother for about seven or eight years.

Q. How many people compose the class of study?

A. About fifty.

Q. What ages do they range?

A. Various ages. They are as young as eight or nine and up to fifty or sixty.

Q. Are all these people employed during the day?

A. The Pioneers are not employed. They devote all their time to ministerial studies. They go from house to house.

Q. Do they receive a salary?

A. No. They receive contributions from people for lectures and so on. No salary except the ministers who come from Bethel, the Brothers Home.

Q. How many days a week do you take this ministerial course?

A. I go at night. On Thursday night we have service meetings for two hours.

Q. Then actually your ministerial studies amount to one hour per night. That is the entire course? I am trying to find out the length of the course—how long it lasts?

A. There is no definite period of time because you can

never learn everything in the Bible. I doubt it if the course ever terminates.

Q. When do you become a minister—immediately upon completing the ministerial course?

A. When I am baptized and consecrate myself to Jehovah God.

Q. If a ten day old baby is baptized he can become a minister?

A. You have to have the use of reason.

Q. What age is considered the age of reason?

A. A boy of about eight years old.

Q. You think a boy of eight years old is capable of becoming a minister?

A. He has to study first.

Q. Actually there is no principle rule of time and of course of study which indicates that a person is a minister. At what age did you decide that you were a minister? As I understand it the person decides for himself when he will be a minister. When did you make the decision?

A. I have not made the decision as yet.

Q. Have you made the decision that you will be a minister?

A. I am a minister.

Q. How long ago did you decide that you were a minister?

A. When I was seventeen.

Q. You were baptized? What was the name of the person who baptized you?

A. I don't know the Brother's name. He was one of Jehovah's Witnesses.

Q. Tell me about it—what took place?

A. We met in Brooklyn in April 1945.

Q. Who met in Brooklyn?

A. The group of us who were going about fifteen of us ranging in age from eight up to fifty. We met and we went to a pool—a swimming pool in Brooklyn—I think

it was the YMCA pool. We got into our bathing trunks and were baptized there.

Q. Were you ever baptized before that?

A. I had been baptized in the Protestant faith.

Q. That Baptism made you a minister—you were just immersed and that made you a minister.

A. Not unless the individual consecrated himself at the same time.

Q. Well—where did you go from there?

A. We just started one of our courses and we began another—on Tuesday nights we studied at home from the Bible—on Thursday we have service meetings and we go out on Sunday mornings.

Q. How soon after you were baptized did you decide that you were a minister?

A. Around May or June.

Q. In other words at the beginning of the course you decided in your own mind that you were not a minister. Did anyone tell you that you were a minister?

A. No.

Q. Did you ever have any visions or did God ever appear to you and tell you to act as a minister?

A. No.

Q. Can you perform any functions of your religion?

A. What do you mean by functions?

Q. Marriage ceremonies?

A. No.

Q. You say you go out on Sundays—how often?

A. We go out on Saturdays too—weekly.

Q. What district do you cover?

A. Woodside.

Q. What procedure do you use when you go from house to house?

A. I knock at the door and tell the people I am a minister from the Watch Tower Bible & Tract Society and show them my card.

Q. You say you tell them you are a minister. The fact of immersion made you a minister? This card shows you to be an ordained minister but you say you are not.
A. It is in the Scripture—we are self-ordained from Jehovah God.
Q. In other words it is your contention that anyone who decides to consecrate himself to God becomes a minister—is that your opinion? That any member of any religion who has consecrated himself to God becomes a minister?
A. He must follow the Commandments.
Q. Assuming there may be 20,000 Catholics, 20,000 Protestants and 10,000 Jews in the United States who have consecrated themselves to God your contention is that they would be ministers?
A. Only God judges that.
Q. Doesn't the fact that millions of Catholics, Protestants and Jews who have agreed to serve their country, notwithstanding the fact that they are consecrated to God, doesn't that indicate to you that it is possible for you to serve your country and at the same time serve God.
A. I mean to serve one or the other and not both.
Q. Suppose you had the opportunity of giving help to a person who was hurt would you help them?
A. Yes.
Q. Suppose you find that in walking along the street a man suddenly falls to the ground—he is shot—nobody knows where the bullet came from. The man is badly wounded—would it make any difference to you if the bullet was fired in anger or accidentally?
A. How would I know.
Q. Would it make any difference to you?
A. I would try to help him anyway.
Q. What then is the difference between that injured man on the street and let's say if you were in the Medical

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Corps in the Army or Navy. Suppose you were serving in the Medical Corps and the man next to you was shot and hurt either accidentally or with felonious intent —Would you try to help him?

A. I would try.

Q. Is there anything in your religion which tells you you must not help your fellow-man? Is the fact that you would be helping a wounded man repulsive to you?

A. It is still war.

Q. It is not war—the war is over—at least we believe it is.

A. That would still be serving man and not God.

Q. You are serving man by working for the Empire Trust Company, are you not?

A. To a certain limit.

Q. You are not asked by the Empire Trust Company to believe in a certain religion anymore than you would be asked in the Army or Navy to believe in a religion of their choice. Is that right?

A. Yes.

Q. You believe there is a Hell?

A. Hell is the grave.

Q. You believe there is a Heaven?

A. Yes.

Q. You believe that sinners are punished?

A. Yes.

Q. You believe there is a Judgment after death?

A. Yes.

Q. You also believe there is a final Judgment?

A. Yes. After that there is a separation.

Q. Do you mean the good are admitted to Heaven?

A. Not all of them. There is a select group who go to Heaven.

Q. Who are they?

A. There are about 144,000 who go to Heaven.

Q. What happens to the remainder of the good?

A. They have an earthly life.

Q. And what about the sinners?
A. They are destroyed in an eternal fire.
Q. You then believe that in order for a person to be saved they must be without sin. You say that the only ones who go to heaven are 144,000 and they are the ones who will reign with Christ.
A. There are millions of people who are going to have an earthly life.
Q. In your house to house canvass you make an attempt to tell the people about saving their souls and to keep ~~back~~ from committing sin.
A. Yes. We also have a free Bible reading and we offer them an invitation to attend our lectures. We encourage home Bible study.
Q. Do you tell them you are there to help them to save themselves? Do you also tell them you are authorized to wean them away from any sins they may be committing?
A. Yes.
Q. Then what happens?
A. It is up to them to make the second move.
Q. How long do you spend at each home?
A. The time varies. If the people are interested we spend about five to ten minutes. We have a lot of territory to cover.
Q. It is your main purpose to bring the teachings to them and to teach them the advantages and disadvantages of sin?
A. Our purpose is to convert them. We tell them to follow the teachings of the Bible, be good and refuse sin.
Q. Don't you know you may be able to do a lot of good among your fellow-men in the armed forces—why should you limit your teachings to civilians only?
A. As I stated before in the service I would be serving man.
Q. You are serving man when you work for the Empire

Trust Company. What is the difference whether you serve the armed forces of your country which has given you so much. You have a life of your own and all the rights to which you are entitled.

A. I have to work to have money to live.

Q. You would receive a salary and your living expenses in the army.

A. I have consecrated myself to Jehovah God.

Q. You don't think that by working for the Empire Trust Company you are serving man?

A. No, I don't think so—just to a certain limit.

Q. You claim that you would be serving man by serving in the armed forces of your country but yet you don't think you are serving man by working for the Empire Trust Company?

A. No. I mean to serve God alone.

Q. That is a parrot-like reiteration.

A. In another year or so I expect to go into the Pioneer service.

Q. Don't you think you could serve your country for one year and while in the service continue your religious practices and then after the year still go on to the Pioneer service?

A. I would be serving man.

Q. It is your statement that you are serving God and not man by working for the Empire Trust Company. The Empire Trust Company is your employer and when you are in the service of the armed forces the Government is your employer. Where does the difference come in?

A. I have to have money to live.

Q. You would receive remuneration in the Army the same as you are receiving by working for the Empire Trust Company—I don't mean the amount would be the same but you would receive remuneration for your work in the Army or Navy.

Mr. Mervish:

Q. Suppose the Government asked you to work for them?

A. I don't think I would be able to continue with my studies.

Q. Don't think—yes or no?

A. Yes.

Q. Well where would the difference be in working for the Empire Trust Company or the Government?

A. We have to have counsel on the Bible—I couldn't get it in the Army or Navy.

Q. Can you tell me where in the Bible you find authority to become a self-ordained minister?

A. Isaiah 61:1, 2.

Mr. Moran:

Q. In that part Isaiah is speaking about himself.

A. He is speaking to the people.

Q. You conclude that text mean you.

A. Yes.

Q. You twist the Scriptures around to suit yourself.

A. Sir, we do not twist the Scriptures around.

Q. In the early part of your testimony you said you had the desire to eventually become a Pioneer. Where do these pioneers live?

A. They come from the Bethel Home.

Q. Do they receive a salary?

A. About $10 a month.

Q. They can live on $10 a month?

A. Whatever else they receive is personal to them, from their families or friends.

Q. If you were in the service, why couldn't you continue your study of the Bible?

A. We have the ministers from the Bethel Home to give us counsel.

Q. You don't find any Jehovah's Witnesses in the armed forces—is that good or bad?

A. That is because they consecrate themselves to serve

God alone and keep themselves apart from the world.

Q. Do you consider that you keep yourself apart from the world?

A. Yes.

Q. Don't you travel in the subway and eat in restaurants with the people of the world?

A. Just to a certain extent—we have to have food and clothing.

Q. Your contention is untrue that the reason why there are no members of Jehovah's Witnesses in the armed forces is that they keep themselves apart from the world. They don't keep themselves apart from the world any more than you do—so how could you say you would be serving man by entering the Army or Navy. All that you are interested in is evading the service of your country.

A. Well, I am sorry you think that way.

HEARING CLOSED

(It is the opinion of the members of this Local Board that the registrant is not entitled to a classification of IV-D. Classification of 1A continued. Induction in due course.)

11/16/1945

Gentlemen:

I received my 1A continued classification and hereby wish to appeal same

Thomas Balogh

Local Board No. 194 23
Kings County 047
NOV 16 1945 194
698 Manhattan Ave.
Brooklyn 22, N. Y.

November 23,1945

Appeal Board No. 31
215 Montague Street
Brooklyn, 2, New York

re: Thomas Balogh
Order No. 12666

Gentlemen:-

The above named person, a registrant of this Board, in Part 1 (a), Series VIII, of his Selective Service Questionnaire states "I am a minister of religion. (b) I do customarily serve as a minister. (c) I have been a minister of the Jehovah's Witnesses since September 1944." In Part 2 (a) "I am a student preparing for the ministry in a theological or divinity school. (b) I am attending the Watch Tower Bible & Tract Society, which was established before September 16, 1939, and is located at (Unit) 31-90 Steinway Avenue, Astoria, L. I.".

On April 13, 1945 this person also submitted a letter stating he was engaged in ministerial work asking that he be classified as such and attached to it a card certifying that he is an ordained minister of Jehovah God, etc.

On April 13, 1945 the registrant was classified 1A and on April 21, 1945 was physically examined and found qualified for general military service.

The entire file of the said registrant was forwarded to the Advisory Board—Theological Panel of New York City Selective Service Headquarters for an opinion. The file was returned to the Board on October 24, 1945 following the registrant's appearance before the Panel, the transcript of which examination will be found enclosed. On Monday, November 5, 1945 the registrant appeared before this Local Board, transcript of testimony enclosed, and following his hearing, his classification was continued 1A, from which classification the registrant now appeals stating that his proper classification is 4D.

Respectfully submitted,
Jacob H. Friedman,
Government Appeal Agent

jhf/cg

ORDER TO REPORT FOR INDUCTION

December 6, 1945

[D. S. S. Form 150]

The President of the United States,

To *Thomas - Balogh*

Order No. *12666*

GREETINGS:

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the land or naval forces of the United States, you are hereby notified that you have now been selected for training and service therein.

You will, therefore, report to the local board named above at *American Legion Building, cor. Greenpoint & Manhattan Aves., Brooklyn, New York* at *6:30 A.* m., on the *18th* day of *December*, 1945

This local board will furnish transportation to an induction station. You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.

Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and subjects the violator to fine and imprisonment.

BLEED THROUGH – POOR COPY

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

Andrew J Moran
Chairman - Local Board #194

Selected Service, December 12, 1945
Local Board No. 194
698 Manhattan Ave.
Brooklyn, New York

In re: Thomas Balogh, 112 Noble St., Bklyn, New York, Order No. 12666.

Order to report for induction set for December 18.

Gentlemen:

In view of the fact that it is my sincere desire to receive a 4-D Classification in harmony with the ruling of General Lewis B. Hershey I would appreciate if you would postpone further action in my case pending further investigation by Washington, D. C.

I have requested them to look into the matter and if they see fit, take a presidential appeal in my behalf.

Thanking you for any consideration shown me I remain,

Respectfully yours,
Thomas Balogh
(Signed) Thomas Balogh

P. S. Duplicate of letter sent to State Director and National Headquarters, Washington, D. C. will be shortly sent to you.

Local Board No. 194 23
Kings County 047
DEC 12 1945 194
698 Manhattan Ave.
Brooklyn 22, N. Y.

SELECTED SERVICE SYSTEM

Local Board No. 194 23
Kings County 047
DEC 14 1945 194

698 Manhattan Ave.
Brooklyn 22, N. Y.

In re: Thomas Balogh
112 Noble Street
Brooklyn, New York

Order Number 12666
Local Board No. 194
698 Manhattan Avenue
Brooklyn, New York

Date of registration: 3-26-45
Date of filing questionnaire: 4-12-45
Date of classifications:
4-13-45 received I-A
11-8-45 received I-A continued
12-3-45 received I-A affirmed

State of New York

I Thomas Balogh, registered with Local Board No.194, for Kings County, New York, am an Ordained Minister, as designated by the Watch Tower Bible & Tract Society, Inc., Brooklyn, New York, and therefore am entitled to 4-D Classification in accordance with the opinion of General Lewis B. Hershey of June 12, 1941, Volume III, Opinion No. 14, Section 5 of said regulations.

In 1944 I undertook a close study of the Bible as set forth in the course established by the Watch Tower Bible & Tract Society, Brooklyn, New York. After careful study and consideration I realized my position and relationship with Almighty God and thereupon consecrated myself to

do His will. My consecration was followed by Water Baptism which baptism served as an outward testimony that I had solemnly agreed to obey the will of Almighty God in all his commandments.

Thereupon I began to fulfill my Godgiven commission which reads:

> "The Spirit of the Lord is upon me; because the Lord hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the Lord, and to comfort all that mourn."
>
> Isaiah 61:1, 2

This is so beautifully illustrated by the Lord Jesus and His faithful apostles by going forth from house to house presenting the message of the Kingdom of God.

Therefore, being in a covenant with Almighty God to do His will, I find it encumbent upon me to act accordingly, in obedience to Jesus' words:

> "And this gospel of the kingdom shall be preached in all the world for a witness unto all nations; and then shall the end come."

In harmony with the scriptures quoted the apostle James supplements as follows:

> "Ye see then how that by works a man is justified, and not by faith only . . . For as the body without the spirit is dead, so faith without works is dead also." James 2:24, 26

In full accord with the above mentioned scriptures and guided by the spirit of the Heavenly Father, Jehovah, I have devoted all my available time for the purpose of instructing the people of God's word and of His provisions under the Theocratic Government, which shall rule right-

eously over the entire earth which shall bring to all who serve Him life, peace and endless joy!

This commision therefore, is definite and clear!

Those who have made a covenant with God, as I have, and consecrated their lives to serve Him must therefore follow out the commandments laid out by the Lord Jesus. It is stated at 1 Cor. 9:16 by the apostle Paul:

> "Even so hath the Lord ordained that they which preach the gospel should live of the gospel. For though I preach the gospel, I have nothing to glory of; for necessity is laid upon me; yea, woe is me, if I preach not the gospel!"

Who shall I harken to, Jehovah God or man?

The question may arise as to my manner of ordination and as to the authority administering such ordination. Such ordination does not lie in the power of any earthly creature, but in the power of Almighty God. In proof of this we have the words of the Lord, quoted at John 15:16, in which he says:

> "I have chosen you, and ordained you, that ye should go and bring forth fruit, and that your fruit should remain: that whatever ye shall ask of the Father in my name, he shall give it to you."

I, therefore do not attend a theological school or seminary in order to be an ordained minister, for such is not required. The apostle Paul states:

> "For the wisdom of this world is foolishness with God . . . " 1 Cor. 3:19

To discard any assumption that these scriptures applied only to Jesus and His followers, I quote 1 Cor. 10:11

> "Now all these things happened unto them for ensamples; and they were written for our admonition, upon whom the ends of the world are come."

I, therefore, being an ordained minister of Almighty God, have shown that I possess the Spirit of the Lord God, by the outlined duties and obligations which I faithfully carry out.

1. Witness Work, which consists of going from door to door and presenting the message by word of mouth and by book and booklet form.
2. Back Call Work, which consists of calling back upon the interested at all times, and giving them more explicit information concerning the message. This is all done freely.
3. Bible Studies, which consists in arranging Bible study meetings with the interested people at their homes. Others of interest are cordially invited to attend such study meeting. These studies are held regularly once a week at a specified hour and day.
4. Street Corner Work, which consists of further spreading the message through the medium of the Watchtower and Consolation magazines, presenting and offering said publications to the general public.
5. Course in Theocratic Ministry, meetings, Watchtower studies, lectures etc. are all attended regularly and faithfully.

In addition to the above-named phases of the work, I am ever alert to deliver testimony concerning God's gracious kingdom whenever the occasion arises.

It might be argued that I, in maintaining a position of secular employment makes void my claim to the ministerial status. Scriptural truths definitely disperse any and all doubts in that respect and can be easily proved.

The apostle Paul is an excellent example to the fallacy of the above-mentioned argument.

Paul was a tentmaker by trade and he followed this trade throughout his ministry. He did not resort to his ministry as a means of livelihood but rather chose his

secular ability to provide his physical needs. Paul's own words as recorded at Acts 20:33, 34 are:

> "I have coveted no man's silver, or gold or apparel. Yea, ye yourselves know, that these hands have ministered unto my necessities, and to them that were with me."

And proof that he engaged in his secular profession throughout his ministry it is recorded of Paul at Acts 18:1-3

> " . . . Paul departed from Athens, and came to Corinth; and found a certain Jew named Aquila . . . and his wife . . . and because he was of the same craft, he abode with them, and wrought: for by their occupation they were tentmakers."

The Bible, therefore, conclusively proves, beyond a question of doubt that my activities in service of the Lord designate me as a minister of the gospel. This fact establishes my claim under the ruling of General Lewis B. Hershey's Opinion as brought forth on the first copy of my letter.

Therefore by this submitted information I will leave the case rest in the hands of those responsible, hoping that a just decision will be the outcome.

> "Therefore now amend your ways and your doings, and obey the voice of the Lord your God; and the Lord will repent him of the evil that he hath pronounced against you.
> AS FOR ME, BEHOLD, I AM IN YOUR HAND: DO WITH ME AS SEEMETH GOOD AND MEET UNTO YOU." Jeremiah 26:13, 14

Confidentially submitted,

Thomas Balogh
(Signed) Thomas Balogh

December 12, 1945

Mr. Thomas Balogh

112 Noble Street,

Brooklyn, 22, New York

Order No. 12666

Dear Sir:-

Your letter of the 12th inst. has been received at this Local Board office. Your notice to report for induction on December 18, 1945 will not be postponed by this Local Board unless instructions to that effect are received from Selective Service Headquarters.

You are therefore ordered to report as directed.

Very truly yours,

Andrew J. Moran,

Chairman

ajm/cg

REPORT OF PHYSICAL EXAMINATION AND INDUCTION

[DSS Form 221]

[Page 1]

Local Board No. 194 23
Kings County 047
DEC 18 1945 194
698 Manhattan Ave.
Brooklyn 22, N. Y.

• • •

1. Name *BALOGH Thomas*

• • •

16. (a) Number of times previously sent to armed forces for examination or induction *1*
(b) Date last sent *April 21, 1945*

• • •

[Page 2]

SECTION II.—LOCAL BOARD EXAMINATION AND CLASSIFICATION.

• • •

20. Determination of local board:
(a) Registrant classified in Class *1A*
(b) Date of classification *4-13-1945*

• • •

December 18, 1945

Mr. Thomas Balogh
112 Noble Street,
Brooklyn, New York

Order No. 12666

Dear Mr. Balogh:-

You have failed to report for induction on December 18, 1945 as directed. If the cause was illness, it is necessary that a letter from the attending physician be submitted to the Board. If not, an explanatory statement will have to be made in person at this Local Board.

You are therefore directed to report at this Local Board immediately upon receipt of this letter. Failure to comply will constitute further action in this matter.

Yours very truly,
Andrew J. Moran,
Chairman

ajm/cg

Government's Exhibit 2

[See page 18, supra]

Brooklyn, New York, January 18th, 1946

I, THOMAS BALOGH, born March 25, 1927, make the following voluntary statement to John F. Baker and Anthony P. Litrento, Special Agents of the Federal Bureau of Investigation. No threats, promises or use of force, have caused me to make this statement, and I know that it can be used against me in a Court of law.

Upon reaching my 18th birthday, I registered for the draft with Local Board 194, Brooklyn, N. Y. Shortly after registering I was classified 1A. About April, 1945, I was sent for a pre-induction physical examination and was accepted. In the early part of December 1945, I received a notice from my draft board to report for induction on December 18th, 1945. I did not report for induction because I claim that I am a minister of the Jehovah's Witnesses Sect.

I joined the Jehovah's Witnesses in April 1944, and became a minister in September of the same year. I am not a conscientious objector to service in the armed forces but I believe I am entitled to a IV D classification as a minister.

No person has influenced, counselled, aided or abetted me in making this claim for exemption from service.

I have read the above and it is true to the best of my knowledge.

/s/ THOMAS BALOGH

Witness:

John F. Baker, Special Agent, F.B.I., N.Y.C.
Anthony P. Litrento, Special Agent, F.B.I., N.Y.C.

Stipulation as to Record and Exhibits

It is hereby stipulated and agreed that the foregoing printed papers tendered by the Defendant-Appellant are correct in every particular. With the exhibits, made a part hereof by reference, and all of which may be filed with and submitted to the Circuit Court of Appeals in their original form, it contains all the evidence in this cause. The said exhibits are hereby made a part of this record upon appeal. The foregoing are stipulated to be the record in this cause upon appeal.

In order to simplify consideration thereof, all documents, papers and exhibits omitted from the printed record on appeal, may be referred to orally and in the briefs, and handed up on the argument of this appeal with the same force and effect as though incorporated herein.

The foregoing record is a true transcript of the record of the District Court. It is stipulated that the Clerk shall file it in lieu of the original papers. The Clerk of this court is requested to certify the foregoing printed copy of the record to the Clerk of the Circuit Court of Appeals as the record on appeal in this cause.

Dated, Brooklyn, New York, July, 1946.

J. VINCENT KEOGH
United States Attorney

By ANTHONY G. GRECO
Ass't United States Attorney

HAYDEN C. COVINGTON
Attorney for Defendant-Appellant

Clerk's Certificate

I, PERCY G. B. GILKES, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify that ~~the foregoing is a correct transcript of the~~ the foregoing record of the said District Court in the above-entitled matter as agreed on by the parties, ~~and stipulated to be filed in this court.~~

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at Brooklyn, New York, in the Eastern District of New York this 25 day of July in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventy first.

[Seal] PERCY G. B. GILKES, Clerk

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 53—October Term, 1946

(Argued October 8, 1946—Decided October 31, 1946)

Docket No. 20312

UNITED STATES, APPELLEE

v.

THOMAS BALOGH, APPELLANT

Before: L. HAND, SWAN, and FRANK, *Circuit Judges*

Appeal from a judgment of the District Court for the Eastern District of New York, convicting the appellant of failing to report for induction into the Army.[1]

Hayden C. Covington, for the appellant. *Vine H. Smith*, for the appellee.

L. HAND, *Circuit Judge:*

Balogh appeals from a judgment, convicting him of failing to report for induction into the Army. Both sides waived a jury, and the case was tried to a judge who, at the conclusion of the testimony, found Balogh guilty as charged, and sentenced him to two years imprisonment. Balogh did not dispute that he refused to appear at the time directed in the induction order; but he offered as a defense that the order was itself invalid, because he was entitled to an exemption under § 5 (d) of the Act. The precise issue was whether the local and appeal boards had given him a fair hearing. As the evidence at the trial did not dispute the correctness of the record of the hearings before the boards, or seek to supplement it, Balogh's guilt depends on the contents of that record, which disclosed the following facts. Balogh registered on March 26, 1945, and filled out and returned his questionnaire on the 13th of April, in which he declared that he was a "window clerk" at the Empire Trust Company, had had ten months of experience in that kind of work, and was not engaged

[1] § 311, Title 50, Appendix, U. S. Code.

in any other "business or work." He also stated that he was "a minister of religion," that he did "customarily serve as a minister," and that he had been "a minister of Jehovah's Witnesses since September 1944." On the other hand, he also stated that he was "a student preparing for the ministry in a theological or divinity school," and that he was "attending the Watchtower Bible and Tract Society." He claimed exemption both as "minister" and "student" under § 5 (d). The local board unanimously classified him "I–A"; and on the 16th it sent him a notice to report for "pre-induction physical examination." He did so report and was found qualified on the 21st; and on the 23d, he asked for a hearing before the board. On that day the New York City "Headquarters" sent his file for an opinion to an "Advisory Board Theological Panel" made up of three members, one of whom was apparently a minister, and all of whom we were told at the bar were Protestant clergymen, though none had any specialized acquaintance with Jehovah's Witnesses, so far as appears. On May 3d, the New York City Director requested Balogh to appear in New York for a hearing before the "Panel," which he did on May 9th, and he was then examined.

His testimony was confusing, and to some extent inconsistent, as to whether he was already a "minister" in the sect of Jehovah's Witnesses, or only a student studying to become one. At first he said that he was "not yet" a minister, though he would become one when he should finish his course, which would be as soon as he felt that he knew enough to preach to others. One becomes a "witness" when he has "fully consecrated his life to the will of Jehovah God"; one becomes a "minister" when one thinks one has enough knowledge of the Bible to know that one is a minister. For example, at the school where he was studying, fifteen of the students were already "ministers" and ten were not. He asked exemption in order to continue his study in preparation for the ministry; although, when he had finished the course, he would have no more authority as a minister than he had at the time. Upon this testimony the "Panel" reported to "Headquarters" on May 9th. The report began with an interpretation of the words, "regular," and "ordained," in § 5 (d), which the "Panel" understood to mean "one duly set apart from the body of members to perform special duties"; in contrast with the use of the word "minister" by Jehovah's Witnesses, which "seems to be applied to every member." The only Jehovah's Witnesses who were set apart for "special duties," were engaged in administrative work, and could not be deemed ministers at all. The Quakers were an example of a sect to which § 5 (d) could not apply because, since "religious duties are laid equally upon, and religious functions

are performed equally by, members of the Meeting * * * none * * * can claim to be a minister." For these reasons, which the "Panel" further amplified, it was "necessary to disregard entirely the use of the word 'minister' by the registrant and by other members of his sect; and to study whether he has been set apart from his fellows for special duties and functions" which "are those of a minister as that word is intended by Congress." Against the "possibility" that Balogh might prove to be so set apart, "if he devotes all his time to teaching and preaching the religion," the "Panel" recommended that the board should examine him further. The report concluded with a finding that he was not a "student."

"Headquarters" returned the report to the local board on October 23d, and Balogh appeared before the board on November 5th, and again testified. He then said that he had been going to the "Watchtower Bible and Tract Society" for seven or eight years, that he was studying, but that there was no definite period for the conclusion of his studies. He would become a minister "when I am baptized and consecrate myself to Jehovah God." He had not yet made the decision to become a minister, yet he was a minister, having so decided when he was seventeen, and having been baptized in April of 1945. He had decided to become a minister in May or June. He went from door to door telling people that he was a minister and showing his card; his habit was to tell them that he was there to help them to save their souls, and was authorized to wean them away from their sins. Such interviews occupied five to ten minutes, if his hearers were interested. The record does not show whether he was told how the "Panel" had reported, or who were its members. At the conclusion of his testimony the board again found against him, the chairman of the board, who had done most of the examining, addressing him as follows: "Your contention is untrue that the reason why there are no members of Jehovah's Witnesses in the armed forces is that they keep themselves apart from the world. They don't keep themselves apart from the world any more than you do—so how could you say you would be serving man by entering the Army or Navy. All that you are interested in is evading the service of your country." On November 16th, Balogh appealed to the appeal board, which on December 3d affirmed the local board's decision; on December 12th, he sought to take an appeal to the President, and this, too, proved ineffectual; and on December 12th he was directed to appear for induction on the 18th. This he failed to do, and it was for this failure that he was indicted.

Jehovah's Witnesses appear to be a sect of a kind by no means uncommon in religious history, which relies for the inspiration of

preachers and members alike upon the Inner Light of immediate personal conviction, ineffable but nonetheless imperative, which invades its possessor's being with an irrefragible authority. One begins to preach when the Spirit clearly manifests itself; there is no definite division setting apart a preacher or "minister." It is idle to expect from such a cult an established, or even an ascertainable, canon of ordination; indeed, it is of its essence that ritual, and even definite dogma, shall be discarded, and that in their place shall be substituted the enlightenment, incommunicable in words, which emanates, directly from the Source. The identity of the content of that enlightenment in the minds of the votaries ordinarily depends upon the mutual awareness of a like infusion of all by the Spirit. Yet it would be a misapprehension to exclude such sects from the purpose of Congress, to which we are to impute, not only a tolerance of, but a positive concern for, the preservation of all creeds that can be grouped within the widely comprehensive term, "religion." It is irrelevant that, in application, it is likely that malingerers will find an escape from their military duties in the loose and vague terms in which honest professors are forced to express themselves: that may justify more searching scrutiny than ordinary, but it also demands a more complaisant approach. Clearly, the Director of Selective Service was of this mind toward Jehovah's Witnesses, as appears from "Opinion No. 14," which we quote in extenso in the margin.[2] This was a direction for the guidance of local boards; and it was written in exactly

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[2] Vol. III, Opinion No. 14 (amended):

NATIONAL HEADQUARTERS,
Selective Service System.

Subject: Ministerial Status of Jehovah's Witnesses.

Facts: Jehovah's witnesses claim exemption from training and service and classification in Class IV–D as duly ordained ministers of religion under section 5 (d), Selective Training and Service Act of 1940, as amended, and section 622.44, Selective Service Regulations, Second Edition, which read as follows:

Section 5 (d): "Regular duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not for registration) under this Act."

Section 622.44: *"Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Question: May Jehovah's Witnesses be placed in Class IV–D as regular or duly ordained ministers of religion exempt from training and service?

Answer: 1. The Watchtowner Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognise as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organi-

the temper which the subject-matter required; it recognized that in this sect the lines were blurred between preachers and laity; that it was even doubtful whether any lines could be said to exist at all; but that this did not dispense with solicitous inquiry in every ca ; an inquiry to be conducted without resort to general rules, such as were proper enough in dealing with established and articulated religious cults.

The concluding remarks of the chairman of the local board show that he at least did not understand his duties in the spirit of these directions. He was condemning Jehovah's Witnesses as a whole, when he said that all that "you are interested in is evading the service of your country." Had this been a conclusion addressed to Balogh individually, the result of an impartial appraisal of his personal refusal, it might indeed have been immune from attack in the courts. It was not; it was a conclusion denying the exemption to Balogh because of his membership, and not pro-

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sation of this religious corporation, the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character of organization of Jehovah's Witnesses renders comparisons with recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions.

3. Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, and at the Farms. Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in the converting of others to their belief. A certified official list of members of the Bethel Family and pioneers is being transmitted to the State Directors of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The members of the Bethel Family and pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and they may be classified in Class IV–D. The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

4. The original paragraph 4 has been consolidated with paragraph 3 of this amended Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

LEWIS B. HERSHEY,
Director.

fessing to detect him personally as a sham. We should for that reason hesitate to accept the denial of the exemption, made as it was in that humor, even if the record were otherwise without flaw; but it is not. On the contrary, the report of the "Panel" independently invalidated the board's proceedings under our decision in *United States ex rel. Levy* v. *Cain.*[8] We there reversed the board for two reasons: first, because the "Panel" was anonymous, and second, because its report invaded the board's functions, and we could not tell how far it had influenced the decision. The report at bar was even more vulnerable. As we have already said, we cannot find that Balogh was told the names of the members either at the hearing before them, or at that before the board; indeed, the record does not show that he even knew what the report had been, or that there had been one. True, the names appeared in the letter from "Headquarters," transmitting the report to the local board; but that leaves it open whether Balogh ever saw the letter; or, when he saw it, if he ever did. As the case comes to us, the board made use of evidence of which Balogh may have been unaware, and which he had no chance to answer: a prime requirement of any fair hearing.

Be that as it may, the report shows that the "Panel" completely misunderstood its functions, if it had any proper functions whatever in such a case, which it did not have, as we shall show. It rested its conclusion upon an interpretation of the statute that Congress did not mean to exempt the ministers of any sect in which laity and ministry or clergy were not separate; a question on which the board had no right to receive advice anyway, and in addition one to which the "Panel" gave the wrong answer. It does not indeed affirmatively appear, as it did in *United States ex rel. Levy* v. *Cain*, *supra*,[8] that any member of the board felt himself bound by this construction of the statute; but that is not enough. "Headquarters" had transmitted the report to the board to use; and the prosecution was bound to prove, when the report contains nothing which the board should have used, that it did not affect the decision. Besides, there was not the slightest excuse for sending the case to a "Panel" so constituted. As we have said, the record does not tell us, except for the names, who were the three gentlemen who made it up; but, even though they were Protestant ministers, they could have no proper part in an inquiry involving Jehovah's Witnesses. We hasten to say that we are sure that they gave their services patriotically; the fault was in no sense theirs; they performed what must have been at best an onerous duty, and what may have been much more; they deserve more recognition for their services than perhaps they ever received. But they were

[8] 149 Fed. (2) 338.

put in a position where their specialized knowledge, whatever that may have been, could not be used, as indeed appears from the fact that all they did—or could do—was to lay down instructions to the board, based upon their construction of the intent of Congress, as to which they were not an iota better qualified than the board itself. In *United States ex rel. Levy* v. *Cain*, *supra*,[3] we said that local boards might avail themselves of the help of those versed in the doctrines and practices of the cult of which the registrant claims to be a minister, or in whose schools he claims to be a student; and to that we adhere. Local boards cannot ordinarily know what are the accepted tests for "ordination," or for a "regular" though unordained, ministry without recourse to those who are acquainted from within with the canons and practices of the church or creed in question. So too as the courses of study which a registrant says he is taking, when he claims exemption as a student. So in the case at bar "Headquarters" might have referred the case to a panel, especially acquainted with the practices of Jehovah's Witnesses, for an opinion whether in accordance with these, Balogh would be recognized as a "regular minister." But the actual "Panel" had no such competence, and did not assume to have; it did all it could do; it construed the statute. Finally, it was to the last degree ingenuous to expect any light from such a panel, which, to act at all, had first to divest itself of those ingrained habits of mind inevitable in any calling; and to bring a completely detached judgment to a heterodox creed. That is not an impossibility, indeed, perhaps the "Panel" in this case succeeded in mastering the handicap; but handicap it was, and a handicap from which the board itself was free, save as the report may have influenced it. Such a panel could not contribute, and was improperly interjected into the proceedings.

The use made of the report, quite aside from the partiality shown by the board, of which we have already spoken, made the hearing unfair. A question arises whether we should now dismiss the indictment. Obviously, the error of receiving the report cannot be corrected upon another trial; nevertheless, conceivably, from the mouths of the members of the board, the prosecution may be able to satisfy the court that the report had no influence upon the result; and to show that the induction was in all other respects valid. While the chance appears to be slight, we will not say that it is so small as now to demand a dismissal of the indictment.

Judgment reversed; cause remanded.

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[3] 149 Fed. (2) 338.

UNITED STATES CIRCUIT COURT OF APPEALS,
Second Circuit

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of October one thousand nine hundred and forty-six.

Present: Hon. LEARNED HAND, Hon. THOMAS W. SWAN, Hon. JEROME N. FRANK, *Circuit Judges.*

UNITED STATES, PLAINTIFF-APPELLEE,

v.

THOMAS BALOGH, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

United States Circuit Court of Appeals, Second Circuit. *United States* v. *Thomas Balogh.* Judgment 53.

United States Circuit Court of Appeals, Second Circuit. Filed Oct. 31, 1946. Alexander M. Bell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS for the Second Circuit

C. C. A. No. 53

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS BALOGH, DEFENDANT-APPELLANT

Petition of United States of America, Appellee, for Rehearing

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To the Judges of the United States Circuit Court of Appeals for the Second Circuit:

1. On October 31, 1946, this Court rendered its decision herein reversing the judgment of conviction appealed from which ad-

judged the defendant guilty of failing to perform a duty required of him under the Selective Service and Training Act of 1940, the rules and regulations promulgated thereunder, in that said defendant wilfully failed and neglected to obey an order of Local Board No. 194, in Brooklyn, New York, directing him to report for induction into the Army.

That the defendant deliberately declined to report as ordered is clearly established, is not denied, and is assumed by this Court. The defense below and the grounds upon which the conviction was assailed in this Court consist exclusively of objections to the action of the Selective Service Board and Appeal Board in refusing to classify the defendant IV–D, either as a clergyman or as a full time student preparing for the ministry, and in classifying him, instead, in Class I–A.

This Court in its opinion necessarily assumes that those objections were available to the defendant at the trial and in this Court, but the opinion contains no comment upon this phase of the questions involved, and does not even refer to the decisions in this Court, and in the Supreme Court, which, until the instant decision, have uniformly held that objections to the classification of a registrant are not available to him as a defense to a criminal prosecution for refusing to comply with the orders of the Selective Service Boards. One of the earliest decisions to this effect, if not the very first, was a decision of this Court.

U. S. v. *Kauten*, 133 F. (2d) 703.

Subsequently, the same rule was restated and applied both by the Supreme Court and by this Court.

Falbo v. *U. S.*, 320 U. S. 549;
U. S. v. *Flakowicz*, 146 F. (2d) 874; cert. den. 325 U. S. 851.

In the instant case for the first time in this Court, and, since the *Falbo* decision, for the first time in any Court, objections to the classification have been deemed sufficient to excuse a registrant ordered to report for induction from the obligation to present himself at the place indicated in accordance with such order. Yet, the opinion herein contains no reference to this change and offers nothing explicit by which attorneys, either for the Government or for registrants, or courts of first instance, may understand why and to what extent the previous rule has been discarded or modified. That the facts in this case are indistinguishable from those upon which this Court has previously reached a precisely contrary result is clear from the following portion of the opinion of this Court in the *Flakowicz* decision, *supra:*

> The case of Flakowicz is asserted to be different in that he was ordered to report for induction after an amendment of the Act, December 5, 1943, 50 U. S. C. A. Appendix, Section 304a, and a change in the regulations to provide for physical examination of selectees *before*, rather than *after*, they are called to report for service. The argument is that in the earlier cases the draft process was not completed, and hence the administrative remedies not exhausted, until the physical examination had been had, whereas Flakowicz had been found physically acceptable, thus completing the selective process, before he was ordered to report for induction * * *. And the *Falbo* case states more than a mere procedural requirement; it is based upon a view of congressional intent that a "prompt and unhesitating obedience to orders" issued in the selective-service process is " 'indispensable to the complete attainment of the object' of national defense." 320 U. S. at page 554, 64 S. Ct. at page 349 (Opinion, Per Curiam 146 F. (2d) at 875).

It may be conjectured that the unstated reason for this Court's complete departure from its earlier pronouncements, and from those of the Supreme Court, is prompted by a later decision of the Supreme Court.

Estep v. *U. S.*, 327 U. S. 114.

In the *Estep* case, however, the majority opinion distinguished the two cases and in effect disclaimed any purpose of overruling the *Falbo* decision. Upon this point the Court said in its opinion, Mr. Justice Douglas writing (327 U. S. at 123):

> *Falbo* v. *United States*, *supra*, does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them.

It is true that this distinction occasioned sharp disagreement between the Justices of the Court, as appears from the dissenting opinion of Mr. Justice Burton, with whom Chief Justice Stone concurred, and likewise in the opinion of Mr. Justice Frankfurter concurring in the result, but strongly disputing the reasoning of the prevailing opinion upon the point here involved.

But however tenuous the distinction between cases like the *Falbo* case and the case at bar on one hand, and the situation presented

in the *Estep* case on the other, that distinction is the only one which has the sanction of authority. Accepting the rule as thus defined, it was the duty of Balogh to obey the order directing him to report by presenting himself at the appointed place. Upon his doing so, if the authorities still desired him to be inducted, he could have refused that final compliance, remaining a civilian, and under the *Estep* case he could then have interposed as a defense to a criminal prosecution such objections as he did present upon the trial here under review.

That is the full extent to which the rule in the *Falbo* and *Flakowicz* cases has been limited, and that is not enough to warrant reversal in the case at bar. Here Balogh did not report at the induction center as Estep did. He declined to report at all. According to both the *Falbo* and *Estep* decisions this was a violation of the Selective Service Law against which he could not defend by criticisms of the Selective Service Boards.

It is submitted, that for this reason the reversing decision of this Court in this case is wrong, and it is more especially urged that if this change of rule is to be maintained, the basis and extent of the new departure should be disclosed to the judges of the courts of first instance, and to the attorneys who are called upon to advise both registrants and the Government.

2. Since the Court discusses the merits of the registrant's strictures upon the action taken by the Selective Service Agencies, we shall not presume to do more than to note very briefly some considerations which are suggested by the Court's opinion.

First of all, the question as to how this registrant should be classified presents, we submit, no difficulty whatever. No classification in his case appears reasonable or defensible other than the I–A classification which he did receive. Here was a bank clerk earning his living as such. His hours were from nine in the morning to five in the evening, except on Saturdays, when his hours were from nine to twelve thirty (Rec. p. 32). He put in about six hours a week in study (Rec. p. 73). His statement of what he did shows that he was neither a "regular" nor a "duly ordained" minister of religion exempted by the statute, and that he was not a student preparing for the ministry in the sense of the statutory exemption.

He could not properly have been classified as entitled to either of these statutory exemptions. Nevertheless, the opinion of this Court condemns his classification because of objections to the evidential matter which the Boards considered and to the manner in which such consideration was given. Little of the statutory provision making the determinations of the Selective Service Boards "final" remains, but it is submitted that when a classifica-

tion is clearly not only proper, but is the only one which is fairl sustained by the facts, such classification should not be disturbe on the gound that it has not been properly arrived at.

Moreover, the grounds upon which the Boards' functioning criticized are, it is submitted, insufficient. They involve a couns of perfection.

First, as to the Panel. The contribution of the clergymer composing the Theological Panel, is to be regarded, as this Cou has previously held, in the nature of expert testimony. So r garded, certainly there is no presumption that they were incon petent to give expert testimony as to what, in fact, distinguish ministers of religion from persons of other vocations. The names appear in the record (Rec. p. 76). It does not appe whether or not the defendant knew who the Panel membe were. There is no suggestion that he desired to know, and the is not the slighest indication that if he had known (assumin that he did not) who and what they were the slightest differen in the result would have followed. A further discription these gentlemen is as follows:

> George H. Richards, Attorney, 68 William Street, Ne York City. Elder of The Brick Presbyterian Churc 1140 Park Avenue, New York City. Member of Th Church Extension Committee of The Presbytery of Ne York. Formerly trustee of McKenzie College, Sao Paul Brazil.
>
> Dr. David E. Roberts, Minister. Professor of Th Philosophy of Religion and Systematic Theology at Th Union Theological Seminary, New York City. Chairma of The Westminster Foundation for Protestant Christia Work at Columbia University. Formerly Dean of Th Union Theological Seminary.
>
> Reverend James H. Robinson, Pastor of The Church The Master (Presbyterian), 86 Morningside Avenue, Ne York City. Member of the Board of Directors of Th Sydenham Inter-Racial Hospital. Member of the Board Directors of the National Association for the Advanceme of Colored People. Member of the Advisory Committee Negro Affairs of The Presbyterian Church, Extensi Faculty of Columbia University.

It is respectfully suggested that the statute assumes that certa general occupational functions are characteristic of ministers all sects, or, at least, are characteristic of ministers whom it is t intention of the legislature to exempt. The mere fact that a se describes everyone in its membership as a minister does not impo

that a minister in the sense of the sect is a minister within the contemplation of the exemption clause. It is said that this Panel construed the statute. It construed the statute in the sense that anyone must who speaks concerning the subjects with which the statute is concerned. The material question, we submit, is not whether it construed the statute (one could hardly speak about the subject with which the statute deals without construing it) but whether the sense in which the panel members understood the statute is correct. The choice, in the end, lies between the meaning ascribed to the statute by the registrant on the one hand, and by the Panel, the Boards, the Courts, and everyone else, on the other hand. If the registrant was right in assuming that the exemption applies to a state of inner grace, then the Panel and the Boards were wrong. If the exemption was intended to involve a more objective and occupational distinction, then the fact that the Panel and the Boards so read it is not a reason for condemning the conclusion reached.

Finally, it is submitted with great deference, that the opinion of this Court mistakes the import of the final remarks addressed to the registrant by one of the members of the Board (Rec. p. 87). This Court says in its opinion:

> He was condemning Jehovah's Witnesses as a whole, when he said that all that "you are interested in is evading the service of your country." Had this been a conclusion addressed to Balogh individually, the result of an impartial appraisal of his personal refusal, it might indeed have been immune from attack in the courts.

It is submitted that in the following passage to which this Court in the above-quoted excerpt refers, the member of the Board uses "they" when he refers to Jehovah's Witnesses, and "you" when he refers to the individual registrant before him:

> Your contention is untrue that the reason why there are no members of Jehovah's Witnesses in the armed forces is that they keep themselves apart from the world any more than you do—so how could you say you would be serving man by entering the Army or Navy? All that you are interested in is evading the service of your country (Rec. p. 87).

It is, we believe, manifest that the member of the Local Board, addressing the registrant in the above passage, was referring to the registrant only ("you") when he made the charge of a single selfish interest in escaping service.

Moreover, it is to be remembered that the Appeal Board normally makes, as it did in this case (Rec. p. 55, 56), the final classification, and the objection that the Local Board was prejudiced

would be unavailing where no such charge is or can be brought against the action of the Appeal Board. (See the emphatic language to this effect in *Falbo* v. *U. S.*, concurring opinion of Mr. Justice Rutledge, 320 U. S. at 555.)

For the reasons above stated, and particularly to effect a clearer understanding of the extent to which the Court's decision in the instant case is intended to modify the rule laid down in previous decisions, we request that a rehearing be granted.

Respectfully submitted.

J. VINCENT KEOGH,
United States Attorney,
Eastern District of New York,
Attorney for Appellee.

VINE H. SMITH,
Assistant U. S. Attorney,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is submitted in good faith not for any purpose of delay and upon grounds which in my judgment are sufficient to justify its being granted.

VINE H. SMITH,
Assistant U. S. Attorney,
Of Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS for the Second Circuit

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UNITED STATES, APPELLEE,

v.

THOMAS BALOGH, APPELLANT

Before L. HAND, SWAN, and FRANK, *Circuit Judges*

Vine H. Smith, for the petitioner.

Per Curiam: Petition for rehearing denied.

L. H.,
T. W. S.,
J. N. F.,
C. JJ.

Filed November 19, 1946.

UNITED STATES CIRCUIT COURT OF APPEALS for the Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of November, one thousand nine hundred and forty-six.

Present: Hon. LEARNED HAND, Hon. THOMAS W. SWAN, Hon. JEROME N. FRANK, *Circuit Judges.*

UNITED STATES, PLAINTIFF-APPELLEE

v.

THOMAS BALOGH, DEFENDANT-APPELLANT

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

ALEXANDER M. BELL,
Clerk.

United States Circuit Court of Appeals, Second Circuit. *United States*, v. *Thomas Balogh.* Order.

United States Circuit Court of Appeals, Second Circuit. Filed Nov. 19, 1946. Alexander M. Bell, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York.

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 127, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS BALOGH, DEFENDANT-APPELLANT

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of December, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventy-first.

[SEAL] ALEXANDER M. BELL,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 800

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS BALOGH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered October 31, 1946 (R. 109), reversing respondent's conviction for refusing to report for induction into the armed forces.

OPINION BELOW

The opinion of the circuit court of appeals (R. 102–108) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 31, 1946 (R. 109), and a

petition for rehearing (R. 109–115) was denied November 19, 1946 (R. 115–116). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal question presented is whether a selectee who refuses to report for induction, as distinguished from one who reports but refuses to submit to induction, is entitled to challenge his selective service classification as a defense in a criminal prosecution for such refusal to report.

The following subsidiary questions arise only if the principal question is answered in the affirmative:

a. Whether in the circumstances of this case it was improper for the board of appeal to consider, together with all the other evidence in respondent's selective service file, an advisory recommendation of a panel on theological classifications which functions in New York City as a part of the Selective Service System.

b. Whether, if a local board member indicated a bias against all Jehovah's Witnesses, that bias vitiates the final classification given respondent by his board of appeal.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, the Selective Service

Regulations, and the Army Regulations are set forth in the Appendix, *infra*, pp. 25–30.

STATEMENT

On February 19, 1946, respondent was indicted (R. 5–6) in the United States District Court for the Eastern District of New York in one count charging that he wilfully failed to report for induction on December 18, 1945, as ordered by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940. At his trial before the court, a jury having been waived (R. 7–8), the Government established that respondent, a Jehovah's Witness who had claimed exemption under the Act as a student preparing for the ministry and as a minister, was finally classified I–A by his board of appeal (R. 11, 55) and that his local board thereafter ordered him to report for induction on December 18, 1945 (R. 11–12, 90–91). Respondent did not report (R. 12–13). Thereafter, in a statement to an F. B. I. agent (R. 99), respondent explained that "I did not report for induction because I claim that I am a minister of the Jehovah's Witnesses Sect."

For his defense, respondent challenged the legality of his selective service classification on the basis of the information in his selective service file, which had been admitted in evidence (R. 10), and at the close of the evidence he moved for a judgment of acquittal because, in his view, he

should have been classified either as a student preparing for the ministry or as a minister, and because the classifying boards had considered an advisory recommendation of the panel on theological classifications which functions as a part of the Selective Service System in New York City (R. 37–39, 42–45). In opposition to this motion, the Government urged that the decision in *Falbo* v. *United States,* 320 U. S. 549, precluded the court from considering the proffered defense of misclassification because respondent had not reported for induction and thus had not exhausted his administrative remedies (R. 39). The trial court ruled, however, that the *Estep* decision, 327 U. S. 114, permitted the court to "consider the whole record and not distinguish between a habeas corpus proceeding and an indictment charging violation of the Selective Service Act" (R. 39–40, 46–47).

In denying respondent's motion for a judgment of acquittal, the trial court held that respondent had been accorded "a full and fair" hearing by the selective service boards and that the boards had not acted arbitrarily or capriciously in classifying him (R. 46–47). In disposing of the question concerning the effect of the use of the advisory recommendation of the theological panel, the court distinguished the decisions in *United States ex rel. Levy* v. *Cain,* 149 F. 2d 338 (C. C. A. 2), and *United States ex rel. Horowitz and Samuels* v. *Pearson,* 151 F. 2d 801 (C. C. A. 3), now pending

on writs of certiorari, Nos. 58 and 59. The court pointed out that in the instant case the names of the members of the panel were disclosed by the selective service file and that, particularly in view of the fact that the local board had previously classified respondent I–A (see p. 7, *infra*), there was no showing that the board blindly accepted the panel's recommendation (R. 45–46, 49–50). Accordingly, the court found respondent guilty and he was sentenced to imprisonment for two years (R. 4, 47).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 109). The court held that respondent's selective service classification was vitiated because the boards had before them the advisory recommendation of the theological panel, and because the court concluded that one local board member had indicated a bias against all Jehovah's Witnesses. However, the court remanded the case for a new trial, instead of ordering that the indictment be dismissed, to afford the prosecution an opportunity to show, if possible, that the recommendation of the panel had no influence on the final classification. Although the Government on the appeal renewed its contention that in a case such as this, involving a failure to report for induction, the defendant is precluded from challenging his classification because of his failure to exhaust his administrative remedies, the Second Circuit did not advert in its opinion to the con-

tention or to the *Falbo* and *Estep* decisions. A petition for rehearing was filed in which the Government again called the court's attention to the applicability of the *Falbo* decision in this case, but the petition was promptly denied without comment (R. 109–116).

The information bearing on the validity of respondent's selective service classification, as shown by his selective service file, may be briefly summarized as follows:

Respondent, having reached the age of eighteen (R. 51), registered with his local board on March 26, 1945, and filed his questionnaire (R. 51–56) on April 13, 1945 (R. 11). In that document, respondent informed the board that he was employed by the Empire Trust Co. as an office clerk and that his usual occupation and that for which he was best fitted was "office work" (R. 52–53). In answering series VIII of the questionnaire, he stated that he had been a minister of religion in the Jehovah's Witnesses sect since September 1944 (R. 53), and that he was also a student preparing for the ministry (R. 54).[1] He requested classification in IV-D (R. 54). At the same time, respondent furnished a written statement to the local board (R. 57–58) in which he said that he had undertaken minister-

[1] In order to qualify for classification in IV-D as a student preparing for the ministry, a registrant must demonstrate that he is pursuing in good faith a full-time course of study (see *infra*, p. 26).

ial studies in September 1944; that beginning in January 1945, "I have from time to time gone into the ministerial service with various ministers of the Watchtower Bible Society, with myself participating therein"; and that because of these activities he was entitled to classification in IV-D.

On April 13, 1945, the local board classified respondent I–A (R. 54), and on April 16 he was ordered to report for a preinduction physical examination (R. 60–61). Respondent reported, and on April 21 he was found physically fit and was issued a certificate of fitness (R. 62–63). Two days later, respondent requested a hearing before the local board (R. 59). Before setting the matter for hearing, the local board referred respondent's file to New York City Selective Service Headquarters for an advisory opinion by the panel on theological classifications (R. 63).

On May 3, City Headquarters advised respondent that (R. 64)

> The Local Board has forwarded the file in your case to this Headquarters for administrative review.
>
> You are requested to appear at the Association of the Bar of the City of New York, 42 West 44th Street, New York City, in Room 605 next Wednesday, May 9th, 1945 at 4:00 P. M. for a special hearing relative to your eligibility for classification in Class IV–D.

724880—46——2

> You will be given an opportunity at that time to discuss your status and submit any additional information you may deem pertinent.

Respondent appeared before the panel, and the transcript of the hearing (R. 69–74) reveals that he stated to the panel that he was not yet a minister, but would become one as soon "as I feel I know enough Bible to tell others" (R. 69); that he first started to attend Jehovah's Witnesses' meetings in September 1944 and that in January 1945 he started studying for the ministry (*ibid.*); that his preparation for the ministry consisted of participating in the religious activities of the sect for seven or eight hours each week (R. 73) as follows: "Tuesday night we study in a home. We study from the Bible. Thursdays are service meetings. Sunday morning we go witnessing and Sunday evening we have the study of the Watchtower magazine" (R. 72); that he did not engage in "backcalling" (*ibid.*); that there are no formal classes for study for the ministry and there are no fixed attendance requirements (*ibid.*); that to have authority to perform rites or officiate at ceremonies the individual must be appointed to be a "company servant" or "backcall servant" or he "might be given the privilege of calling on people" (R. 74); that he possessed no authority to perform marriages (*ibid.*); and that he worked at a full-time job as a clerk in a bank working

eight hours each day, Monday through Friday, and one-half day on Saturday (R. 73).

Thereafter, the City Director's office wrote the local board as follows (R. 76–77):

> At the request of this Headquarters the above named registrant appeared before the appropriate division of our Advisory Panel on Theological Classifications. Transcript of registrant's examination by the panel, together with the panel's report in the matter, are enclosed herewith.
>
> Registrant appeared before the following panel members: Mr. George H. Richards, Dr. David E. Roberts and Rev. James H. Robinson.
>
> While the panel's report should be considered together with the other information in the file, the responsibility of determining the registrant's status rests in the first instance with the Local Board, and the Board's determination in every case must be predicated upon the exercise of its own deliberative and independent judgment.

The advisory opinion of the panel (R. 65–68) set forth the pertinent provisions of the statute and regulations and stated that "the word 'minister' was used and intended by Congress in the ordinary accepted use of the term to mean one duly set apart from the body of members to perform special duties," and that since the designation of "minister" is applied by the sect to all Jehovah's Witnesses, the test in the case was whether respondent in fact possessed different

reponsibilities and functions than other persons who are only members of the sect (R. 66); that "if a Jehovah's Witness claims IV–D classification, the Local Board should ascertain whether by his own course of life he has become entitled to a special status—apart from most Jehovah's Witnesses—as a minister by reason of the amount of time he gives to teaching and preaching the religion of his sect and not merely the performance of the administrative duties thereof" (R. 68). The opinion concluded (*ibid.*) that in view of the limited nature of respondent's religious activities as shown at the hearing, he was not a full-time student preparing for the ministry or a minister of religion within the meaning of the statute and regulations.

On November 5, 1945, respondent was given the hearing before the local board which he had previously requested (R. 55). An extensive hearing was held, in which respondent testified under oath and again set forth the basis of his claim to exemption from military service (R. 77–87). At the close of the hearing, the board reaffirmed the I–A classification it had previously given him (R. 55). On November 16, 1945, he appealed to his board of appeal (R. 54, 88). His entire file, including the materials from the panel on theological classifications (see R. 89), was forwarded to the board of appeal, and on December 3, 1945, that board classified him I–A (R. 55).

On December 6, 1945, the local board ordered respondent to report for induction on December 18 (R. 90–91) and, as we have shown, *supra*, p. 3, he did not report.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding, *sub silentio*, that a selectee who did not report for induction as ordered and thus was never finally accepted for military service may nevertheless challenge his classification as a defense to an indictment charging that he refused to report for induction.

2. In not adhering to the decisions of this Court in *Falbo* v. *United States*, 320 U. S. 549, and *Estep* v. *United States*, 327 U. S. 114.

3. In holding that consideration of the advisory recommendation of the panel on theological classifications by the classifying boards vitiated respondent's selective service classification.

4. In holding that an expression of bias against all Jehovah's Witnesses by a local board member affects a final classification made by the board of appeal.

5. In reversing the judgment of conviction.

REASONS FOR GRANTING THE WRIT

1. The facts demonstrate beyond dispute that respondent did not report for induction, that he did not undergo the final physical examination at

the induction station, that he has not been finally accepted for military service, and, therefore, that he has not exhausted his administrative remedies. In these circumstances, this Court's decisions in *Falbo* v. *United States,* 320 U. S. 549, and *Estep* v. *United States,* 327 U. S. 114, foreclose his proffered defense of misclassification. Nevertheless, the circuit court of appeals reversed the conviction because the court concluded that respondent's classification was invalid. Although the Government argued the *Falbo* point in its brief in the circuit court of appeals and on oral argument, the court failed to discuss the question in its opinion; a petition for rehearing (R. 109–115) again raising the point was denied without comment. The decision of the court amounts to a refusal, *sub silentio,* to adhere to the decisions in the *Falbo* and *Estep* cases.[2] In the circumstances,

[2] There are numerous cases which, the Department's files show, involved similar facts and the same selective service procedure as in the present case, and in which the defense of misclassification was not allowed. See, e. g., *Penley* v. *United States*, 145 F. 2d 748 (C. C. A. 1); *United States* v. *Flakowicz*, 146 F. 2d 874 (C. C. A. 2), certiorari denied, 325 U. S. 851; *Stull* v. *United States*, 141 F. 2d 494 (C. C. A. 4), certiorari denied, 322 U. S. 745; *Cahoon* v. *United States*, 152 F. 2d 752 (C. C. A. 5), certiorari denied October 14, 1946, No. 183; *Skisano* v. *United States*, 149 F. 2d 645 (C. C. A. 6); *United States* v. *Rinko*, 147 F. 2d 1 (C. C. A. 7), certiorari denied, 325 U. S. 851; *Pacman* v. *United States*, 144 F. 2d 562 (C. C. A. 9), certiorari denied, 323 U. S. 786. See also our briefs in opposition in the following cases: *Cahoon*, No. 183, Oct. T. 1946, pp. 7–10; *Flakowicz*, No. 1072, Oct. T. 1944, pp. 4–7; *Rinko*, No. 1071, Oct. T. 1944, pp. 8–10.

we think the circuit court of appeals has so far departed from the controlling decisions of this Court as to call for an exercise of the Court's power of supervision.

Except for the fact that in the *Falbo* case the selectee was ordered to report to a civilian public service camp, rather than to an induction center, the material facts of this case are identical with the facts of the *Falbo* case. In that case the selectee had been classified as a conscientious objector, had passed a pre-induction physical examination, and was ordered to report for work of national importance. He failed to report. Since he still might have been rejected by the civilian public service camp to which he was assigned,[3] this Court held that he had failed to exhaust his administrative remedies and was therefore foreclosed from challenging his classification in the criminal trial. The *Estep* decision reaffirmed the

[3] The Court pointed out in the *Falbo* opinion that figures compiled by the Government showed that, "as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected." 320 U. S. at 553.

After his conviction was affirmed, Falbo unsuccessfully resorted to habeas corpus to assert the contention that when he passed the preinduction physical examination, he had exhausted his administrative remedies. See *United States ex rel. Falbo* v. *Kennedy*, 141 F. 2d 689 (C. C. A. 4), certiorari denied, 322 U. S. 745. In the *Estep* opinion, the Court characterized *Falbo's* case as one in which habeas corpus was denied because "additional steps in the selective service procedure remained to be taken." 327 U. S. at 124–125.

Falbo rule, pointing out that there is no judicial review prior to the time the registrant has taken all the steps in the selective process and has been finally accepted by the armed forces. The rule was held not to be applicable in *Estep's* case, because he had reported for induction and had been finally accepted at the induction station.

At best, respondent here is in the same position as Falbo. While he was found to be physically fit after a preinduction physical examination on April 21, 1945 (R. 60–63), this was not the final determination of his acceptability by the military forces, which Section 3 (a) of the Selective Training and Service Act requires as a condition precedent to induction. Under the procedure in effect since February 1944 (see *Billings* v. *Truesdell*, 321 U. S. 542, 554–555),[4]

[4] The preinduction examination system was created to comply with Section 5 of the Act of December 5, 1943, 57 Stat. 599, which provides:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for

when a selectee reports for induction he must undergo, *inter alia,* a physical inspection to determine his final acceptability for service. The examination is by military personnel and the procedure involved is prescribed by Army Regulations. Thus paragraph 15 of AR 615–500, August 10, 1944 (*infra,* pp. 27–30), provides that the registrants who report for induction will be divided into two classes: (1) registrants who are to be given a "complete examination," and (2) registrants whose preinduction examinations remain valid and who are to be given a "physical inspection." Subparagraph (e) of paragraph 15 provides:

> e. *Registrants forwarded for induction.*— Registrants forwarded for induction will ordinarily have had a preinduction physical examination within 90 days and will require only a physical inspection. Registrants so forwarded, who have not been previously examined, or who have been previously examined and found not acceptable, or who have been examined and found

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military service as a result thereof, shall remain so classified and report for induction in regular order."

It has been argued that by virtue of this statute certification of fitness upon preinduction examination constitutes the final determination of the registrant's acceptability. But this argument overlooks the words of the statute which provide for a preinduction examination "subject to reexaminations." Consistently with the statute, the Army Regulations, as we show, provide for such a reexamination when the registrant reports for induction.

acceptable more than 90 days previously, will be given a complete examination. The preinduction physical examination will be void after 90 days from the date of the examination shown on DSS Form No. 221.

(1) *Physical inspection.*—Registrants found acceptable for military service on preinduction physical examination and reporting to an armed forces induction station on order to report for induction within 90 days of such examination, will be given a careful physical inspection, with all clothing removed, for contagious diseases, apparent defects, and intercurrent illness or injury. Such registrants will be rejected only under exceptional circumstances which indicate marked deterioration in physical condition, or error or omission by the preinduction examining personnel.

* * * * *

In the present case, respondent underwent his preinduction examination on April 21, 1945, more than 90 days prior to December 18, 1945, when he was required to report for induction. In these circumstances, paragraph (e) provides that the preinduction examination is void and that the selectee shall be given a "complete examination." Thus, it seems plain that unless and until respondent reported to the induction station and underwent the "complete examination," there could have been no final determination of his acceptability.

There is no question that respondent knew that his final acceptability would be determined when he reported for induction, for the order to report for induction instructed him (R. 90–91) that after reporting to the local board and being transported to an induction station

> You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.
>
> Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. * * *

Because of his refusal to report, respondent never reached the induction station and he never underwent the processing—physical, mental and otherwise—by which his acceptability to the armed forces might have been determined.

Apart from the facts of this case, experience demonstrates that reporting for induction and undergoing the final physical inspection at the induction station are an integral part of the process by which the final determination of the selectee's acceptability for service is determined. We are advised by the Director of Selective Service that during the period from February 1944 to June 1946 approximately 2,600,000 selectees were examined for induction into the armed

forces after previously having been found acceptable upon preinduction examination, and that of these approximately 230,000 men were rejected. In the *Falbo* case, this Court relied upon similar statistics as demonstrating under a similar procedure that the final determination of acceptability had not occurred where the selectee did not report to the camp (see *supra*, p. 13). In the *Estep* case, which involved the same procedure as this case, the Court assumed that the selectee was required to report to the induction station and be accepted before he had exhausted his remedies.

Undisputably, respondent's acceptability for military service has not yet been finally determined, because he refused to report for induction, and he has therefore failed to exhaust his administrative remedies. On the authority of the decisions in the *Falbo* and *Estep* cases, we submit that the decision below is plainly erroneous and that it would be appropriate without more to grant the writ of certiorari and reverse the judgment of the circuit court of appeals on the ground that it is not compatible with the decisions of this Court. Cf. *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715, rehearing denied, 320 U. S. 816.

2. As we have shown, the decision below improperly considered the merits of respondent's defense of misclassification. While it is perhaps unnecessary to consider that question, we believe

that the court's decision on the merits is likewise erroneous.

a. *The advisory recommendation of the panel.* The principal basis for the decision below was the fact that the selective service boards considered the advisory recommendation of the panel on theological classifications which functions in New York City as a part of the Selective Service System. The question of the propriety of this practice is presently before the Court for decision in *Eagles* v. *United States ex rel. Horowitz and Samuels,* Nos. 58 and 59, this Term. The arguments in support of the practice are known to the Court, and we shall not reassert them here. There are, however, two points of distinction between the *Horowitz* and *Samuels* cases and this case to which we shall advert.

In the present case, the names of the members of the panel were submitted to the local board, together with the opinion of the panel and the transcript of its hearing (see R. 76).[8] Thus, there can be no question that the classifying boards were aware of the identity of the members. Insofar as respondent is concerned, he had an opportunity to ascertain the names of the members of the panel when he appeared before it, and thereafter the information was in his selective

[8] To meet the requirement of the Second Circuit's decision in *United States ex rel. Levy* v. *Cain*, 149 F. 2d 338, the Selective Service System as a matter of practice now submits this information to the local board in every case.

service file. Section 605.32 of the Selective Service Regulations[6] guaranteed to him the right to inspect his file and thus to ascertain this information if he desired it. There is no showing that respondent ever sought the information, or that he ever sought to challenge the competence of the members of the panel. We do not think that one who closes his eyes to available information may thereafter complain that he was not furnished that information. And, we submit, the court below is in error in asserting that because respondent "may have been unaware" of the names of the panel members (R. 107), his classification is vulnerable. Assuming that the defense of illegal classification was open to him, it was for respondent to show that his classification was invalid, and that burden was not satisfied here merely by supposing that respondent may have been unaware of the names of the panel members.

The other point of difference between this case and the *Samuels* and *Horowitz* cases relates to the religious affiliation of the members of the panel. In the latter cases, representative mem-

[6] Section 605.32 provides in part:

"*Information not confidential as to certain persons.* No information in a registrant's file shall be confidential as to the persons designated in this section, and any information may be disclosed or furnished to or examined by such persons, namely:

"(1) The registrant, or any person having written authority from the registrant."

bers of the Jewish faith rendered advisory opinions in cases involving registrants who claimed to be students preparing for the ministry in that faith. In this case the three members of the panel were members of the Protestant faith, and the court below held that it was improper for the classifying boards to consider their advisory opinion concerning the status of a member of the Jehovah's Witnesses sect.

In our view, no registrant claiming exemption from service as a minister or as a student preparing for the ministry has a right to have his claim judged by members of his particular faith. If there were such a right, neither the Selective Service System nor the courts could possibly perform their functions under the Act. We recognize that where members of one religious group render an advisory opinion concerning the ministerial status of a member of another group, there exists a possibility that the claim will be judged according to standards of the former group. But, in our view, the mere existence of this possibility ought not to invalidate the action of the theological panel. Instead, in each case the proceedings must be scrutinized to make sure that the registrant has been accorded a fair hearing.

Turning to the transcript of respondent's hearing before the panel, we are unable to find any semblance of abuse. Rather, the hearing, in our judgment, reflects an attitude of fairness and understanding on the part of the members of the

panel (see R. 69–74). The opinion of the panel (R. 65–68) demonstrates that the panel fairly appraised respondent's claims to exemption in the light of the pertinent statutory and regulatory provisions. Consistently with the view of the Selective Service System,[7] the Department of Justice and the courts which have passed on the question,[8] the panel concluded that not every Jehovah's Witness is a minister of religion within the meaning of Section 5 (d) of the Act. The panel correctly recommended that only those members of the sect whose status is different from that of the ordinary member are entitled to exemption and that the local board should ascertain in each case whether the registrant by his own course of life has become entitled to the status of a minister by reason of the amount of time he gives to teaching and preaching the religion of the sect. On the facts of this case, we submit that the panel reached the only conclusion possible—that a Jehovah's Witness who works full-time as a bank clerk and who devotes seven or eight hours each week to religious activities is neither a minister of religion nor a full-time student preparing for the ministry within the meaning of the act and regulations (see *infra*, pp. 25–27).

[7] See Opinion No. 14 of the Director of Selective Service, quoted in the court's opinion (R. 105–106).

[8] See, e. g., *Sunal* v. *Large*, 157 F. 2d 165, 175 (C. C. A. 4), pending on petition for a writ of certiorari, No. 535, this Term, and cases cited.

b. The circuit court of appeals also thought that a member of the local board expressed a bias against all Jehovah's Witnesses and that this, too, detracted from the validity of respondent's classification (see R. 106–107). We think that the ambiguous statement of the board member to which the court referred was merely an expression of belief that respondent, not all Jehovah's Witnesses, was seeking to evade military service (see R. 87).[9] In any event, however, the asserted bias of the local board member is not relevant. For respondent was finally classified by his board of appeal, and there is no showing whatever that any member of that board was biased. See *Bowles* v. *United States,* 319 U. S. 33; *Falbo* v. *United States,* 320 U. S. 549, 555 (concurring opinion).

CONCLUSION

For the reasons stated, we submit that this petition for a writ of certiorari should be granted, and that, in the circumstances, it would be appropriate for this Court to reverse the

[9] The statement in question was made at the close of respondent's hearing before the local board on November 5, 1945 (see p. 10, *supra*) as follows:

"Your contention is untrue that the reason why there are no members of Jehovah's Witnesses in the armed forces is that they keep themselves apart from the world. They don't keep themselves apart from the world any more than you do—so how could you say you would be serving man by entering the Army or Navy. All that you are interested in is evading the service of your country."

judgment below without further briefs or argument.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1946.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

1. Section 5 of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 305) provides, in part, as follows:

> (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

2. Section 622.44 of the Selective Service Regulations provides:

> *Class IV–D: Minister of religion or divinity student.*
>
> (a) In Class IV–D shall be placed any registrant:
>
> (1) Who is a regular minister of religion, or
>
> (2) Who is a duly ordained minister of religion, or
>
> (3) Who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act of 1940 (September 16, 1940), or (4) Who has been accepted for admittance to a theological or divinity school referred to in subparagraph (3) above and who, under the general direction of such

theological or divinity school, is pursuing a course of study required by the theological or divinity school in which he has been accepted for admittance and who has been formally accepted as a candidate for the ministry by the highest authority governing ordination of a recognized church, religious sect, or religious organization.

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

* * * * *

3. Local Board Memorandum No. 187, as amended, an official interpretation of Section 622.44 of the Selective Service Regulations, provides in part, as follows:

2. *Student preparing for the ministry.*— (a) In order to qualify for classification in Class IV–D as a student preparing for the ministry, a man must be pursuing in good faith a full-time course of study for which credit will be given toward the completion of his training in the school which he attends, and it must be evident that he is

preparing himself to become a regular or duly ordained minister of religion. The course of study may be carried on in the theological or divinity school or in another institution. Where carried on in another institution, the student's course of study must be under the general direction of the theological or divinity school in which he has been accepted.

(b) The "full-time" nature of the course of study is established when the student is carrying a course similar to that normally designed in schools to occupy the full academic interest of a student. It would be similar to the type of course pursued by a student in order to complete a so-called four-year college course leading to the Bachelor's degree in eight semesters with a normal load of approximately sixteen hours of recitation per week. In a high school it would normally be equivalent to four class recitation periods per day. If a student is making satisfactory progress toward the completion of his course of study, a moderate amount of outside employment does not render the course less than "full-time."

* * * * *

4. Army Regulations 615–500, August 10, 1944, provide in part, as follows:

15. Procedure.—*a. General.*—All registrants reporting to the armed forces induction stations will be examined on the day they report and the examination completed that day if practicable. Most registrants have their first contact with the Army at armed forces induction stations. It is important that they be treated with kindness and given courteous consideration. The personnel at armed forces induction sta-

tions will bear this in mind and at no time will a registrant be ordered about or spoken to in a rude or discourteous manner.

b. *Meeting and checking men.*—Registrants forwarded for preinduction physical examination or for induction will normally arrive at the armed forces induction station in groups, in charge of one of the registrants appointed as a leader by the local board. Local boards will notify the commanding officer of the armed forces induction station of the hour of arrival of each group sent. Guides and transportation from railroad or bus stations may be furnished when required. The leader of each group will have DSS Form No. 217 (Physical Examination List) in quadruplicate, or DSS Form No. 151 (Delivery List) in quadruplicate, whichever is appropriate, or both, showing the designation, number, and address of the local board from which the group was forwarded, and containing the names of all registrants in the group, and DSS Form No. 221, original and two copies for each man in the group. The men will be checked against the above lists. All registrants listed on Form No. 217 will be routed to the first station of the complete examination. Registrants listed on Form No. 151 will be divided into two groups:

(1) Those requiring a complete examination.

(2) Those requiring a physical inspection.

c. *Physical examination procedure.*—For each registrant requiring a complete examination, a medical work sheet will be initiated upon which will be entered the registrant's name and the number of his local board. The registrant will sign his medical work sheet and his name will be com-

pared with his name on the DSS Form No. 221. He will then be directed to the first examining station. His medical work sheet and other records will be kept in his possession throughout the examination; care will be exercised at each examining station to prevent the possibility of "crossing" registrants' records.

* * * * *

e. *Registrants forwarded for induction.*— Registrants forwarded for induction will ordinarily have had a preinduction physical examination within 90 days and will require only a physical inspection. Registrants so forwarded, who have not been previously examined, or who have been previously examined and found not acceptable, or who have been examined and found acceptable more than 90 days previously, will be given a complete examination. The preinduction physical examination will be void after 90 days from the date of the examination shown on DSS Form No. 221.

(1) *Physical inspection.*—Registrants found acceptable for military service on preinduction physical examination and reporting to an armed forces induction station on order to report for induction within 90 days of such examination, will be given a careful physical inspection, with all clothing removed, for contagious diseases, apparent defects, and intercurrent illness or injury. Such registrants will be rejected only under exceptional circumstances which indicate marked deterioration in physical condition, or error or omission by the preinduction examining personnel.

(2) *Registrants reporting for induction who have positive serology.*—Registrants who are forwarded by Selective Service local boards on order to report for induc-

tion will be held over if necessary at the armed forces induction station until reports on the serological tests for syphilis are obtained. All registrants whose records indicate a positive serological test for syphilis will be held over until the results of spinal fluid surveys for evidence of central nervous system syphilis have been accomplished. Should the spinal fluid survey of a registrant indicate cerebrospinal syphilis, or other examination show evidence of cardio-vascular or visceral syphilis, the registrant will be rejected.

(3) Registrants found acceptable will be allocated to the Army and Navy as prescribed in paragraph 14. Those rejected will be returned to the local boards which forwarded them. The disposition of each registrant will be indicated on DSS Form No. 151

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948

FILE COPY

JAN 2 1947

SUPREME COURT OF THE UNITED STATES

October Term 1946

No. 800

UNITED STATES OF AMERICA *Petitioner*

v.

THOMAS BALOGH *Respondent*

Respondent's MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit

HAYDEN C. COVINGTON

Counsel for Respondent

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THOMAS BALOGH *Respondent*

□

Respondent's MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit

MAY IT PLEASE THE COURT:

Respondent objects to the suggestion of petitioner that the judgment of the court below be reversed simultaneously with the granting of the petition for writ of certiorari. The decision of the court below is not so plainly erroneous and egregious as to authorize such procedure. Therefore *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees,* 320 U. S. 715, rehearing denied, 320 U. S. 816, is not applicable and should not be followed.

The very least that respondent is entitled to in this Court is a full and complete hearing upon the question presented. The decision of the court below did not amount to a refusal, *sub silentio,* to adhere to the decisions of this Court in the cases of *Falbo* v. *United States,* 320 U. S. 549, and *Estep* v. *United States,* 327 U. S. 114. The holding in the *Falbo* case was not applicable but the holding in the *Estep* case was applicable and the court below followed the *Estep* holding by considering the validity of the draft

board classification and action as did the trial court. The court below did not depart from the controlling decisions of this Court.

Respondent says that, since the Selective Training and Service Act of 1940 was amended on December 5, 1943, to require a preinduction physical examination and the determination of the acceptability to be made prior to the issuance of the order to report for induction, the administrative remedies were completely exhausted so as to make inapplicable the *Falbo* decision and applicable the *Estep* decision when Balogh received his preinduction physical examination. See 50 U. S. C. App. §§ 303 and 304 (a), 57 Stat. 596, 599.

Petitioner cites the case of *United States* v. *Flakowicz* (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851. The decision in that case was overruled and declared to be erroneous by the Second Circuit in *United States ex rel. Kulick* v. *Kennedy,* decided October 29, 1946. In fact, the United States District Court for the District of Connecticut, on the basis of the *Kulick* decision, on December 4, 1946, ordered Flakowicz discharged on a writ of habeas corpus. In that case the court said: "In the case at bar, unlike the *Smith* and *Estep* cases (1946) 327 U. S. 114, and the *Kulick* case (CCA-2) October 29, 1946, the petitioner refused to appear at the induction center. In that respect, it is similar to the *Falbo* case. However, at the time of Falbo's refusal to report, final determination of physical fitness and acceptability to the armed forces was made at the induction center following compliance with the order to report for induction. Subsequent to the *Falbo* case, however, the Congress required that final determination of physical fitness and acceptability to the armed forces be made upon request prior to the actual reporting for induction to avoid the hardship incident in the uncertainty of the registrant's future entrance into the armed services until time of actual induction. *Act of December 5, 1943, c. 342, sec. 5, 57 Stat. 599.*

It is true that the new requirement of Congress posed some administrative problems and led the Selective Service System to provide for cases in which examination, and determination of fitness, were not followed by induction within a ninety-day period. However, it seems plain that the Congress was attempting, insofar as possible, to provide for the completion of the administrative determination of fitness and acceptability prior to the date of actual induction, and it would seem that in practically all cases the administrative process was actually terminated upon the issuance of the certificate of fitness. . . . The amendments to the Act and regulations ended the system of final determination of eligibility, and acceptability, at that time and place, and required that it be done at some time prior to the date of induction. . . . [¶] 'All had been done which could be done' by Flakowicz. The date of induction had arrived. True, the language of the *Falbo* and *Billings* cases appears to require actual reporting at the induction center. Yet both cases involved registrants ordered to report under the system in force prior to the Congressional provision of pre-induction physical examinations and the amendment to the regulations to conform to the Congressional directive. . . . [¶] Flakowicz had taken every possible step in the administrative process. On the morning of March 8, 1944, nothing had been done by the board or the director of Selective Service to reopen his classification or postpone his induction. The only function to be performed on that morning was submission to induction. Under those circumstances the Court will not require the empty gesture of reporting and refusing in person, instead of refusing by letter, in order to allow a testing of the legality of the classification." *United States ex rel. John Flakowicz* v. *Myrl E. Alexander, Warden,* Judge J. Joseph Smith.*

* This same reasoning and interpretation on the amendment of the Act and regulations was adopted by this Court in Gibson *v.* United States and Dodez *v.* United States, decided December 23, 1946. See the slip opinion, pages 8-10.

"Exacting this would stretch the requirement of exhausting the administrative process beyond any reason supporting it. Cf. *Levers* v. *Anderson,* 326 U. S. 219." (*Gibson* v. *United States, supra,* page 11 of slip opinion.) Respondent says that this Court ought to reconsider its decision in the *Falbo* case, supra, as requested by Dodez and Gibson in Nos. 23 and 86, October Term 1946, because it is an erroneous decision which stretched the requirement of the exhaustion of administrative remedies beyond any reason supporting it.

Reference is here made to the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Wells* v. *United States* (decided December 23, 1946) where that court held that the failure to report for induction under the circumstances did not bring the registrant under the decision of *Falbo* v. *United States, supra,* and that the court preferred to follow and apply the decision in *Estep* v. *United States, supra,* in reviewing the appeal. In that decision the court said: "The distinction between the *Falbo* and *Estep* cases is this: Falbo failed to report for the last step in the administrative process and, therefore, was denied the right to prove in a criminal trial that the induction order was invalid. Estep appeared at the induction center but refused to submit to induction; thus having pursued his administrative remedy to the end, he was permitted to defend upon the ground that his classification was illegal and his induction unauthorized. Each of the above cases is in point here, but Falbo has such a narrow application that we prefer to put our decision upon the later case, which held that, where the induction order was so contrary to law as to exceed the board's jurisdiction, its action might be interposed as a defense in a criminal prosecution."

The petitioner says that this case is similar to *United States* v. *Rinko* (CCA-7) 147 F. 2d 1, certiorari denied 325 U. S. 851, where Rinko failed to undergo the complete physical examination process at the induction center follow-

ing his reporting for induction in response to the order to report. See the Government's Memorandum in Opposition to the Petition for Writ of Certiorari in the *Rinko* case, No. 1071, October Term 1944. However, petitioner fails to recognize that this Court stated in Footnote 15 of its decision in the case of *Estep* v. *United States,* No. 292, October Term 1945, that the *Rinko* case presented exactly the same question presented to the Court in the *Estep* case. (See Note 15, page 7 of slip opinion.)

Moreover, petitioner for granting certiorari relies upon *Cahoon* v. *United States* (CCA-5) 152 F. 2d 752, certiorari denied October 14, 1946, No. 183, October Term 1946. Of course, the *Cahoon* case is still pending before this Court upon petition for rehearing. The *Cahoon* case presents to this Court precisely the same question that is presented in this case and if this Court grants certiorari in this case, it certainly ought to grant certiorari in the *Cahoon* case! *

The respondent has no objection to the granting of certiorari in this case. In fact this Court ought to grant certiorari in this case as well as the *Cahoon* case. This should be done, in a situation of this kind, to clarify the law, which appears to be in a state of great confusion on account of the *Falbo* and *Dodez* decisions' being allowed to stand together.

It is true that Balogh was accepted upon a preinduction physical examination on April 21, 1945 (R. 60-63) and was ordered to report for induction on December 18, 1945. (R. 90-93) It is also conceded that respondent was not reexamined within 90 days prior to the date he was ordered to report for induction. However, this did not prevent his previous acceptability for training and service in April from

* Reference is here made to the petitioner's reply to the Government's memorandum in opposition to the petition for writ of certiorari in No. 183, October Term 1946, Cahoon *v.* United States, pages 1-6. In such reply brief there is discussed the intent of Congress to make mandatory the determination of acceptability of the registrant thereby requiring exhaustion of administrative remedies before issuance of the order to report for induction.

being conclusive for the purpose of deciding whether he exhausted his administrative remedies.

The very fact that Balogh was given the order to report for induction without having been given a reexamination compels either one of two conclusions:

First: Section 5 of Public Act 197, 78th Congress, approved December 5, 1943 (57 Stat. 596, 599, 50 U. S. C. App. §§ 303, 304 (a)), made mandatory that his acceptability be determined before he was ordered to report for induction. The fact that he was ordered to report for induction makes it conclusively presumed that his acceptability had been finally determined before the order to report for induction was issued. The army regulations 615-500 (see petition for writ of certiorari, pages 15, 27) to the effect that an examination would not be accepted by the army more than 90 days after the examination are *ultra vires* and contrary to the amended statute and are void. They do not deprive respondent of his rights under the Act. "Thus it seems clear, as we have already said, that the Act, rather than the War Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men." *Billings* v. *Truesdell,* 321 U. S. 542, 552.

Moreover, the physical condition of acceptability having been proved to exist in April is presumed to continue unless and until the Government offers positive evidence that the physical condition of the respondent had changed. *Lewis* v. *Hawkins,* 90 U. S. 119; *Local 167* etc. v. *United States,* 291 U. S. 293; *Reading Co.* v. *Geary* (CCA-3) 40 F. 2d 142; *Eureka Bank* v. *Bay,* 90 Kan. 506, 135 P. 584; *State* v. *Dexter,* 115 Iowa 678, 87 N. W. 417.

Second: If it is held that the registrant must be examined within 90 days before the order to report for induction issues in order to make his acceptability conclusive so as to entitle him to claim that he has exhausted his administrative remedies, then the issuance of the order to report

for induction in this case more than 90 days following the preinduction physical examination, without having the respondent re-examined, makes the order to report absolutely void and a nullity because it is contrary to the Act of December 15, 1943, Section 5, 57 Stat. 599, and Section 629.1 of the Regulations. Section 629.1 specifically provides that "Every registrant, *before* he is *ordered* to report for induction, *shall be given a preinduction physical examination* under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent." (Emphasis added) The intention and meaning of this regulation is clarified in the language of the old regulation when Section 629.1 was first promulgated: "The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore, when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered to report for induction unless the Director of Selective Service or the State Director of Selective Service directs otherwise." *

Therefore the language of this Court in *Estep* v. *United States* controls here: "It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tung* v. *United States*, 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations." See page 5 of slip opinion, 327 U. S. 114.

The decision in *Tung* v. *United States* applies here. In the *Tung* case the defendant did not report for induction. Under the Government's argument he had not exhausted

* This old regulation was taken out by amendment in July 1944.

his administrative remedies because the order to report was a nullity inasmuch as it was issued in violation of the Act and Regulations. Therefore, for the same reason, it must be held that the order to report in this case is a nullity because it was issued without a preinduction physical examination by the army to finally determine his acceptability, and that it was not necessary for the respondent to report. Furthermore, the decisions in *United States* v. *Peterson* (DC-ND-Calif.) 53 F. Supp. 760, and *United States* v. *Lair* (DC-ND-Calif.) 52 F. 2d 312, apply here.

The fact that the theological panel, that heard the respondent and recommended that he be denied his claim for exemption as a student preparing for the ministry and as a minister of religion under § 5 (d) of the Act, was not composed of Jehovah's witnesses and was made up of members of other faiths who applied the doctrine and principles of the orthodox religions in determining whether respondent was a minister of Jehovah's witnesses is such a rank departure from procedural due process as to require the reversal of the case.

This question was left specifically open for decision by this Court in *Eagles* v. *United States ex rel. Samuels*, No. 59, October Term 1946, decided on December 23, 1946, where this Court said: "Distinct questions would be raised if a registrant of one faith were referred to a theological panel on which his faith was not represented. See *United States* v. *Balogh*, — F. 2d —, decided October 31, 1946." (15 L. W. 4113, 4116)

The recommendation of this illegally constituted theological panel that illegally considered and judged the respondent's case was relied upon by the draft boards in this case and therefore vitiated the entire proceedings. This being a criminal case, it being stipulated that the boards actually considered the theological panel's recommendation, and the presumption of innocence being a stronger presumption than the presumption of legality of the administrative

proceedings, it cannot be here held that the presumption that was relied upon in the *Samuels* case, *supra*, can be invoked.

Furthermore this is the same procedural due process question that is now posed to this Court in the *Cahoon* case, *supra*, where the board of appeal considered and decided the registrant's case and denied his claim for exemption solely upon the information obtained from a book that was read by the chairman of the board of appeal, the origin and authenticity of which book is unknown.

Counsel for respondent again requests the Court to grant the petition for certiorari in the *Cahoon* case and hereby consents to the grant of the petition in this case. The Court should call both cases in for argument and decision. Certainly this case should not be decided and the judgment reversed simultaneously with the granting of the petition for certiorari as suggested by the petitioner.

WHEREFORE, for the reasons above stated, the respondent does not object to the granting of the writ of certiorari and says that the writ prayed for in the *Cahoon* case (*Cahoon* v. *United States*, No. 183, October Term 1946) should be granted. Moreover, it is not appropriate to reverse the judgment below without further briefs and arguments in this case. On the contrary this case should be set down for argument, along with the *Cahoon* case, and these important questions that remain undecided by this Court be heard and considered before decision in order that justice be done.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Respondent

December 31, 1946

FILE COPY

JAN 28 1947

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 800

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UNITED STATES OF AMERICA *Petitioner*

v.

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ON PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

Respondent's
PETITION FOR REHEARING
including
Alternative Motion for Clarification

HAYDEN C. COVINGTON
Counsel for Respondent

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ON PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT COURT OF APPEALS
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Respondent's
PETITION FOR REHEARING
including
Alternative Motion for Clarification

MAY IT PLEASE THE COURT:

Within the time fixed by the rules of this Court, respondent files this his petition for rehearing, including an alternative motion for clarification of the decision of the Court rendered on January 20, 1947. The Court is requested to grant the petition or, in the alternative, the motion, for the reasons hereinafter discussed.

The summary action of the Court in vacating the judgment and remanding the case to the Circuit Court of Appeals, simultaneous with the granting of the petition for writ of certiorari, was inappropriate. Not only does this method of disposing of the case injure the respondent but

it does not show a proper regard for the deliberation and consideration by the Circuit Court of Appeals of the questions presented upon the petition for writ of certiorari and discussed in respondent's memorandum in opposition.

The court below did not ignore entirely the question raised by the Government that the administrative remedies had been exhausted. The case was argued as a companion case to the *Kulick* case in which this Court granted petition for writ of certiorari on January 20, 1947. (*Alexander* v. *United States ex rel. Kulick,* No. 840, October Term 1946) The *Kulick* case was decided by the court below (*United States ex rel. Kulick* v. *Kennedy,* 157 F. 2d 811) two days before the opinion was filed in the *Balogh* case (157 F. 2d 939). In the *Kulick* case the court below stated that one who had been accepted upon a preinduction physical examination had exhausted his administrative remedies so as to qualify himself to challenge the draft board order in defense to an indictment charging him with failure to report. This is implicit in the following words of the court below taken from its opinion in the *Kulick* case: "Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies [citing *United States* v. *Nelson,* 143 F. 2d 584 (CCA-2)]; in a number of others they had done so and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz, supra* (146 F. 2d 874), which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12. While that court has said over and over again that such denials are not to be taken as affirmances, it was not to be expected on May 12, 1945, that the court would grant a writ in precisely the same circumstances in which it had just denied one." (157 F. 2d 811)

The failure of the court below to write upon this matter in the *Balogh* case should not be taken to indicate that the

question was not presented to the court below. The question was presented to the court in the briefs and oral argument. The court below had adequately and previously stated its views in the companion case. (*United States ex rel. Kulick* v. *Kennedy,* 157 F. 2d 811)

Even if this Court should regard the decision of the court below as a departure from its opinion in the *Falbo* case (320 U. S. 549) the importance of the questions presented and the need for clarification of the law as to how far one must go in order to exhaust his administrative remedies did not justify the summary reversal of the judgment below. Indeed, this Court should have analyzed the distinctions and grounds involved which were not involved in the *Falbo* case because of the amendment to the Selective Training and Service Act of 1940 by the Act of Congress on December 5, 1943. (50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599)

The decision cited by petitioner as grounds for its suggestion for the summary disposition upon petition for writ of certiorari (*Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees,* 320 U. S. 715, rehearing denied, 320 U. S. 816) is not appropriate here. The reason is that the difference in the law and the distinction in the facts between the *Balogh* and the *Falbo* cases prevents the conclusion that the decision of the Court below was in defiance of the decision of this Court in the *Falbo* case. Even if it is considered to be in defiance of the decision in the *Falbo* case, it would be appropriate, because of the substantial differences in the two cases as contended by respondent, to write an opinion upon the matter after deliberation rather than summarily reversing the judgment.

Even when the United States District Court refused to follow the decision of this Court in *Minersville School District* v. *Gobitis,* 310 U. S. 586 (*Barnette et al.* v. *West Virginia State Board of Education,* 47 F. Supp. 251) this Court

did not summarily reverse, but took the case in for argument and, after deliberation, refused to reverse the judgment of the district court and follow the *Gobitis* case, *supra*.

Respondent contends that, if he has an opportunity to argue and brief the distinction between this and the *Falbo* case growing out of the amendment to the Act and Regulations requiring a preinduction physical examination, he may have the good fortune of persuading this Court to refuse to follow the *Falbo* case as the Court refused, in the *Barnette* decision, to follow the *Gobitis* case.

Without a considerate opinion by this Court on the matters presented, there remain interstices in the law. These blank spaces and dark spots in the law as to when the administrative remedies are exhausted serve only to confuse and confound the lower courts and counsel.

For example, Judge Clarence G. Galston, in the trial of this case in the district court, held that the decision of this Court in *Estep* v. *United States* (327 U. S. 114) reversed the *Falbo* decision. In the trial court the Government argued that the *Falbo* decision applied. (Record page 39) Judge Galston said that since the *Estep* case was decided, "a rather different situation" is presented "and I am prepared to follow the admonition in the *Estep* case and therefore consider the whole record and not distinguish" between the cases. (Record pages 39-40)

Judge Philip L. Sullivan of the United States District Court for the Northern District of Illinois, in *United States* v. *Dewitt Elwyn Whitmer*, No. 46, Cr. 5, decided March 13, 1946, stated: "I am convinced that the *Estep* and *Smith* case overrules the *Falbo* case."

A similar conclusion was reached by Judge J. Joseph Smith of the United States District Court for the District of Connecticut, in *United States ex rel. Flakowicz* v. *Alexander*, decided December 4, 1946. In that case Judge Smith said: "In the case at bar, unlike the *Smith* and *Estep* cases

(1946) 327 U. S. 114, and the *Kulick* case (CCA-2) October 29, 1946, the petitioner refused to appear at the induction center. In that respect, it is similar to the *Falbo* case. However, at the time of Falbo's refusal to report, final determination of physical fitness and acceptability to the armed forces was made at the induction center following compliance with the order to report for induction. Subsequent to the *Falbo* case, however, the Congress required that final determination of physical fitness and acceptability to the armed forces be made upon request prior to the actual reporting for induction to avoid the hardship incident in the uncertainty of the registrant's future entrance into the armed services until time of actual induction. *Act of December 5, 1493, c. 342, sec. 5, 57 Stat. 599.* It is true that the new requirement of Congress posed some administrative problems and led the Selective Service System to provide for cases in which examination, and determination of fitness, were not followed by induction within a ninety-day period. However, it seems plain that the Congress was attempting, insofar as possible, to provide for the completion of the administrative determination of fitness and acceptability prior to the date of actual induction, and it would seem that in practically all cases the administrative process was actually terminated upon the issuance of the certificate of fitness. . . . The amendments to the Act and regulations ended the system of final determination of eligibility, and acceptability, at that time and place, and required that it be done at some time prior to the date of induction. . . . [¶] 'All had been done which could be done' by Flakowicz. The date of induction had arrived. True, the language of the *Falbo* and *Billings* cases appears to require actual reporting at the induction center. Yet both cases involved registrants ordered to report under the system in force prior to the Congressional provision of pre-induction physical examinations and the amendment

to the regulations to conform to the Congressional directive. . . . [¶] Flakowicz had taken every possible step in the administrative process. On the morning of March 8, 1944, nothing had been done by the board or the director of Selective Service to reopen his classification or postpone his induction. The only function to be performed on that morning was submission to induction. Under those circumstances the Court will not require the empty gesture of reporting and refusing in person, instead of refusing by letter, in order to allow a testing of the legality of the classification." *United States ex rel. John Flakowicz* v. *Myrl E. Alexander, Warden,* Judge J. Joseph Smith.*

In view of the conflict of opinions between various circuit courts of appeals upon this matter, it certainly ought to appeal to this Court to say something about these questions rather than keep the bench and the bar in the dark by a *per curiam* order like that entered in this case.

The second and fifth circuit courts of appeals have held that the certificate of fitness issued upon preinduction physical examination showing acceptance for service by the armed forces constitutes an exhaustion of administrative remedies so as to permit draft board orders to be challenged in defense to indictments charging registrants with failure to report for induction into the armed forces. *Alexander* v. *United States ex rel. Kulick,* No. 840 October Term 1946; *United States* v. *Balogh,* No. 800, October term 1946; *Cahoon* v. *United States,* No. 183, October Term 1946 (see opinion of the Circuit Court of Appeals on petition for rehearing, 155 F. 2d 150); *Turner* v. *United States,* No. 871, October Term 1946; *Garland* v. *United States,* No. 911, October Term 1946; *Wells* v. *United States,* No. 916, October Term 1946.

A contrary view has been taken by the United States

* This same reasoning and interpretation on the amendment of the Act and regulations was adopted by this Court in Gibson v. United States and Dodez v. United States, decided December 23, 1946, 67 S. Ct. 301, 305-306.

Circuit Court of Appeals for the Tenth Circuit in *Hudson* v. *United States,* No. 887, October Term 1946.

The conflicts of the courts upon this matter should be ground enough to justify this Court in granting the petition for rehearing and restoring this case to the docket and setting it down for submission on oral argument and briefs.

It is true that the respondent was ordered to report for induction more than 90 days from the date he was given a preinduction physical examination. It is also true under the regulations that a preinduction physical examination more than 90 days old will not be acceptable to the armed forces. But these facts do not require a conclusion that the respondent had not exhausted his administrative remedies. The acceptance upon the preinduction physical examination given more than 90 days before his order to report for induction makes inapplicable the *Falbo* decision. The reason for this is that the amendment to the Act marked the line where the administrative remedies are exhausted at the time the preinduction physical examination is given, which is unaffected by regulations of the armed forces and the Selective Service System's which provided that acceptance upon a preinduction physical examination more than 90 days old will not be final. 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599.

The purposes of the amendment to the Act cannot be defeated by regulations requiring physical examination simultaneously upon reporting for induction. The amendment to the Act mandatorily required that the certificate of fitness be issued before the order to report for induction was made.

Prior to the amendment to the Act eliminating the determination of acceptability simultaneously with reporting for induction, a great evil had developed through the interruption of the life and business of thousands if not hundreds of thousands of selectees ordered to report for in-

duction who were discharged as physically unacceptable upon reporting for induction.

When the proposed amendment to the Act was being considered by the United States Senate, the following deliberations were had, as reflected by 89 Congressional Record, pages 8079, 8129-8133:

Mr. BUSHFIELD [South Dakota]:

. . . By way of explanation, let me say that most of the men whose classifications the Senate has been discussing have established homes, businesses, or professions. The record of the Selective Service indicates that forty and a fraction percent of all men called in the United States during the month of August [1943] were deferred because of physical defects. In fairness to the group of men who are about to be called if the proposed legislation is not passed, we should afford them every possible opportunity to ascertain in advance whether they will be accepted; because it will be found that 4 out of every 10 men in the class which is to be called will be returned to their homes as unacceptable. In most cases those men will have either sold their businesses, closed their offices, or lost their jobs; and it is not fair to call them and later return them to their homes, if there is an opportunity to ascertain in advance whether they are acceptable. . . .

. . . Evidently the examination is of little value, because the induction center records show that a fraction over 40 percent of all persons examined at the induction centers are returned to their home as unfit.

I say to the Senate that, inasmuch as we have adopted the policy, it is unfair to the heads of families to force them to close their offices or give up their jobs before they are ordered to the induction centers. We should do everything possible to avoid the situation of having a man give up his job, but subsequently,

because he does not pass the physical examination at the induction center, return to his home and have to look for a new job or have to open up another business.

Mr. CLARK of Missouri:

I think the pending amendment is an extremely meritorious one and certainly should be included in the bill. When I was at home I talked to a great number of draft officials, and the situation the Senator [Bushfield of South Dakota] has mentioned was brought up in a great many instances. . . .

The result is that if a man has a little business or has a home on which he is paying, if he sells his business or tries to dispose of his home before he takes his examination and then is rejected for physical reasons or for any other reasons, he will be out of a job or will have disposed of his home. On the other hand, if he has passed the examination, he has only 3 weeks, in the case of the army, or 1 week, in the case of the Navy, to dispose of his home or business, all of which simply means he gives it away.

Mr. BARKLEY [Kentucky]: Mr. President, I should like to say I think the proposal is meritorious, and should be offered as an amendment to the bill. . . .

Mr. HILL [Alabama]: . . . We certainly ought not to do anything which would make any one examinational final.

Much of the argument has been to the effect that insofar as possible the men who are rejected because of physical disabilities ought to be re-examined and taken into the army. . . . There ought not to be a final examination. As I have said, if a man is examined today, what would that examination be worth 6 months, 9 months, or perhaps a year from now?

Mr. BUSHFIELD: We are all pretty much burdened in this country today, and little more burden on

a few doctors in the examining division in the induction centers will not hurt them any more than it hurts the boys who are being called. . . .

Mr. BARKLEY: . . . If they are accepted for induction they go to an induction center and are subjected to a physical examination, under the regulations of the War Department, to determine whether they are fit.

Mr. BUSHFIELD: And 40 percent of them are sent back home.

Mr. BARKLEY: I understand, but if they are found fit, they are inducted.

Mr. BUSHFIELD: That is correct.

Mr. BARKLEY: The examination to determine their fitness takes place before they are inducted. . . . I have had my attention called to cases in which the local draft boards passed men. They went up to their induction centers, were examined, and rejected because of a more or less minor physical defect, which in all probability could be removed within 60 or 90 days, or which might be cured by nature. They were told that they were not fitted at that time to enter the service, and therefore they were not inducted, but they were ordered to report back within 60 days, or told that they would be called back in 60 days or 90 days to determine whether by that time the physical defect had been removed. Under the terms of the Senator's amendment the examination before induction would be final. . . .

Mr. BUSHFIELD: It would be final only in the sense that it is final today, when the man is examined at the induction center and is rejected.

Mr. BARKLEY: It is not final. He may be examined time and time again.

Mr. BUSHFIELD: I know it is not final, because the local board may send him back to the induction center as many times as it sees fit.

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We have been extremely solicitous of the welfare of everyone connected with the war effort. It seems to me that the men who are now being taken into the army under the new policy are entitled to a certain leeway if they want it. I ask Senators, in all seriousness, how many of them would be able to wind up their business affairs during 3 weeks. . . .

I do not believe the inductees particularly care whether the examination is a free one. They want an opportunity to know in advance whether they must lose their businesses, or their offices, or their jobs, before they are taken.

Mr. PEPPER [Florida]: That is what I had in mind. That is what all of us wish to see corrected. We wish to provide that a registrant may have as early an examination as it is possible to give him. . . .

Mr. SHIPSTEAD [Minnesota]: I have personal knowledge of several men who have suffered in consequence of the impracticable procedure which has been followed, and I think this is one of the most reasonable provisions that has been offered for inclusion in the bill at any time. . . .

Mr. BARKLEY: Mr. President, . . . I think that at the end of the amendment the words "shall be binding upon such board in the same manner as now followed upon examination after induction" should be changed to read: "Shall be binding upon such board in the same manner as now followed upon examination immediately prior to final induction." The words "immediately prior to final induction" would be substituted for the word "after", which appears in line 10 after the word "examination".

Mr. BUSHFIELD: I accept the suggestion . . . and ask that the modification in the amendment be made. . . .

Mr. BARKLEY: . . . I should not care to precipitate my examination if I thought I was going to be inducted, unless I was in a hurry to have it done so that I could enter the army. In those cases I suppose the examination would be facilitated, but if I were pretty certain that I could not stand the examination, and still was more or less suspended in mid-air until it was determined, I would naturally want to know what my status was going to be.

Mr. BUSHFIELD: I thank the Senator.

Mr. PEPPER: Mr. President, I should like to ask the Senator if he has in mind that the examination should be final for all time?

Mr. BUSHFIELD: No; no more than at present.

Mr. PEPPER: It is for the particular call?

Mr. BUSHFIELD: Yes.

Mr. PEPPER: So, if he were to be called again the previous examination would not be a finality?

Mr. BUSHFIELD: No; and the Selective Service and the draft boards can send a man back as many times as they want to.

The amendment to the Act, when finally approved by Congress, read as follows:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexam-

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ination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in the regular order." 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599.

By Amendment No. 200 (9 F. R. 440-442), effective January 10, 1944, the present procedure for preinduction physical examination was established. See Section 629 of Selective Service Regulations. This procedure for preinduction physical examination by the armed forces was operative for registrants to be inducted into the armed forces. The effect of this change in the Act was recognized by the Court in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555, where the amendment to the Act and Regulations is discussed.

It is manifest that it was the intention of Congress, in providing for the amendment to the Act, to eliminate entirely the practice of determining the final acceptability of a registrant simultaneously with reporting for induction. The argument of petitioner in this case perverts entirely the amendment to the Act and Regulations. The construction contended for by petitioner would restore the evil practice of physical examination to determine acceptability given simultaneously upon reporting for induction. Certainly to allow the determination of final acceptability simultaneously with reporting for induction would be restoring the practice that was condemned by Senator Bushfield and extirpated by the amendment to the Act and Regulations discussed in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555.

Section 629.1 (b) of the Selective Service Regulations providing for the acceptance upon preinduction physical examination to be effective for only 90 days was taken out of the Regulations by amendment No. 239 dated July 3, 1944. This section reads as follows:

"The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore,

when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered for induction unless the Director of Selective Service directs otherwise."

Therefore the Army Regulations (¶ 15 of AR 615-500, August 10, 1944) providing for temporary acceptance for a period of 90 days following the preinduction physical examination do not justify the contention that respondent has not exhausted his administrative remedies. At least, for the purpose of determining the rights of the registrant and in ascertaining whether or not respondent has exhausted his administrative remedies, it must be held that the regulations which authorize the determination of the final acceptability simultaneously with the order to report for induction are *ultra vires* because contrary to the amendment to the Act. "Thus it seems clear, as we have already said, that the Act, rather than the War Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men." *Billings* v. *Truesdell,* 321 U. S. 542, 552.

Moreover, Section 629 of the Selective Service Regulations specifically provides that "Every registrant, *before he is ordered* to report for induction, *shall be given a preinduction physical examination* under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent." (Emphasis added)

It should be observed that this old provision had absolutely no effect at the time Balogh was ordered to report for induction. It had been deleted long before he was ordered to report.

If according to army regulations a preinduction physical examination would not be acceptable to the armed forces

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after 90 days then it would be the duty of the draft boards to give the registrant another preinduction physical examination rather than order him to report for induction where a physical examination would be given as a part of the process leading up to induction. Indeed Section 629.1 (b), above quoted, mandatorily required that the preinduction physical examination be given before the registrant is ordered to report for induction. Therefore it must be conclusively presumed that the preinduction physical examination that respondent received prior to the time he was ordered to report for induction was acceptable to the armed forces.

If this Court reaches the conclusion that the administrative remedies were not exhausted because the preinduction physical examination was more than 90 days old at the time respondent was ordered to report, then counsel says that the petition for rehearing should nevertheless be granted because the judgment of the court below reversing the conviction can be properly affirmed upon other grounds. The issuance of the order to report for induction without previously giving respondent a preinduction physical examination that would be acceptable to the armed forces is an *ultra vires* act in defiance of the amendment to the Act and section 629.1 of the Regulations requiring that preinduction physical examination be given before the order to report issues.

"It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tung* v. *United States,* 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations." *Estep* v. *United States,* 327 U. S. 114.

In *Tung* v. *United States,* 142 F. 2d 919, the defendant did not report for induction. Under the Government's argument he had not exhausted his administrative remedies because the order to report was a nullity inasmuch as it was issued in violation of the Act and Regulations. Therefore, for the same reason, it must be held that the order to report in this case is a nullity because it was issued without a preinduction physical examination by the army to finally determine his acceptability, and that it was not necessary for respondent to report. Furthermore, the decisions in *United States* v. *Peterson* (DC-ND-Calif.) 53 F. Supp. 760, and *United States* v. *Lair* (DC-ND-Calif.) 52 F. Supp. 312, apply here.

Inasmuch as the order to report for induction was void at the time it was issued, in spite of the fact that respondent may be held not to have exhausted his administrative remedies, as Tung had failed to do in the *Tung* case, *supra,* the judgment of the court below should nevertheless be affirmed. Instead of granting certiorari, the Court should set aside the order granting certiorari and enter an order denying certiorari because the judgment of the court below rested on another valid ground which was adequate to support it. *Bell Telephone Co.* v. *Van Dyke,* 296 U. S. 533; *Laws* v. *Davis,* 281 U. S. 702.

In event the Court, upon consideration of this petition for rehearing, is of the opinion that the petition for rehearing should not be granted for the reasons hereinabove discussed, respondent says that the order of this Court should be clarified. The order of the Court is ambiguous. The Court vacated the judgment of the court below and remanded the case to the United States Circuit Court of Appeals for the Second Circuit, citing *Falbo* v. *United States,* 320 U. S. 549. From a reading of the order it is not clear what the Court intended for the Court of Appeals to do in this case. From one reading of the order the conclusion may be reached that this Court intended for the

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Court of Appeals to reconsider the case in light of the *Falbo* decision and pass upon the question of whether or not the administrative remedies had been exhausted, which the court of appeals did not discuss in its opinion. From another reading of the order the conclusion may be reached that this Court is of the opinion that the judgment of the court below departed from the *Falbo* decision and therefore the court of appeals should not have considered the validity of the order to report but should have affirmed the judgment of the district court because the case came within the ambit of the *Falbo* decision. If this Court intended for the case to be remanded to the court below for further proceedings and consideration of whether the *Falbo* decision applies, it would be enlightening to the court below and counsel to have the Court so state. If the Court intended that the judgment of the district court should have been affirmed under the doctrine of the *Falbo* decision, then it would remove any doubt from the matter by directing the court below to affirm the judgment of the trial court. As the order now stands, counsel is in a quandary as to what steps to take when the mandate gets back to the court of appeals. For these reasons counsel suggests that if the order of this Court dated January 20, 1947, is allowed to stand in this case it should be clarified so that everyone concerned will know what to do.

If this Court took the action it did in vacating the judgment of the court below and remanding the case to the court of appeals because it was of the opinion that respondent had not exhausted his administrative remedies for the reason that the preinduction physical examination was more than 90 days old at the time he was ordered to report, then such reasons could best be stated in the order so as to avoid confusion in future cases that might come before the courts where the record shows that the preinduction physical examination was given within 90 days of the order to report for induction.

Counsel for respondent now represents the appellee before the court below in the case of *United States ex rel. Flakowicz* v. *Alexander*. If the order of this Court vacating the judgment of the court below was on the ground that the *Falbo* decision applies, then when the appeal of the *Flakowicz* case is considered by the court below it is likely that the Government will argue and it is possible that the court below may conclude that the judgment in the *Balogh* case would require reversal of the order of Judge Smith in the *Flakowicz* case, where the preinduction physical examation was given within 90 days of the order to report for induction.

WHEREFORE respondent prays that the order of this Court dated January 20, 1947, be vacated and set aside and that upon consideration of this petition the writ of certiorari be ordered granted and that the case be set down for oral argument and submission upon the substantial questions of (a) whether respondent exhausted his administrative remedies; and if so (b) whether the indictment should be dismissed because of the invalidity of the order to report for induction.

In event the Court does not order the cause set down for argument and submission upon consideration of this petition, it is further prayed that the order of the Court be vacated and set aside and that an order be rendered and entered denying the petition for certiorari for the reason that the judgment of the court below is based upon adequate

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grounds to support it. In the alternative, respondent prays for further clarification of the order of the Court for the reasons hereinabove discussed. Respondent prays for such other and further relief to which the Court may find him justly entitled.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Respondent

Certificate

The undersigned counsel for respondent hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Respondent

January 27, 1947

No. 800. UNITED STATES *v.* BALOGH. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. January 20, 1947. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Circuit Court of Appeals. *Falbo* v. *United States*, 320 U. S. 549. MR. JUSTICE MURPHY is of the opinion that the petition for certiorari should be denied. *Acting Solicitor General Washington* for the United States. *Hayden C. Covington* for respondent. Reported below: 157 F. 2d 939.

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